

Legal Aspects of Web 2.0 Activities:

Management of Legal Risk Associated with Use of YouTube, MySpace and Second Life

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1 Executive Summary

- [1.1] This Report, prepared for Smart Service Queensland (“SSQ”), addresses legal issues, areas of risk and other factors associated with activities conducted on three popular online platforms—YouTube, MySpace and Second Life (which are referred to throughout this Report as the “Platforms”). The Platforms exemplify online participatory spaces and behaviours, including blogging and networking, multimedia sharing, and immersive virtual environments.
- [1.2] This Report explains the legal relationships among the various participants in these Platforms, which need to be understood in order to identify and address areas of concern for organisations that establish webspaces on the Platforms. There are legal relationships between Platform Providers and Platform Members, Platform Providers and Platform Visitors, among Platform Members themselves and between Platform Users (comprising both Platform Members and Platform Visitors) and third parties. These relationships are governed by each Platform’s specific Terms of Use or Terms of Service (which are referred to throughout this Report as “TOU”), as well as any applicable legislation (such as the *Copyright Act 1968*) and common law principles. The TOU may require all Platform Users to apply the rules set out in the TOU to their relationships with other Platform Users. However, where the use of an organisation’s webspace in a Platform gives rise to indirect relationships between the organisation and third parties, the general law will apply. For example, liability to a third party may be incurred where a person visits the organisation’s webspace in a Platform and infringes copyright, defames another person or misuses another person’s personal information.

[1.3] The Report identifies the principal legal risks arising from the use of the Platforms and sets out a range of steps that can be taken to reduce those risks. Risks shared by all three Platforms are considered, as well as additional risks that arise where a Platform permits an enhanced level of interactivity. The use of all three of the Platforms gives rise to a common group of legal risks, that is, copyright infringement, defamation and failure to protect the privacy of personal information. Beyond these shared risks, additional legal risks arise as the degree of interactivity provided by the Platform increases. Consequently, Second Life, the most interactive of the Platforms, gives rise to additional legal risks to those which are encountered by users of YouTube or MySpace. For example:

- YouTube and MySpace provide the ability to “screen out” or delete defamatory or offensive commentary. Second Life does not provide this ability since defamatory or offensive statements cannot be prevented in the real-time environment of Second Life;
- Unlike YouTube, Second Life does not have an automatic right of reuse of material between users, meaning that nearly all content in the immersive virtual environment of Second Life is capable of intellectual property rights infringement; and
- unlike in YouTube or MySpace, organisations in Second Life need more concerted intellectual property management policies to examine issues such as open content licensing of material in Second Life and risks regarding patentable material under the Second Life TOU user patent licence.

[1.4] Organisations that establish webspaces in the Platforms can take a range of steps to minimise the legal risks arising from use of the Platforms, such as:

- adopting policies and procedures for use of these Platforms by the organisation's employees and other users which clearly define appropriate and inappropriate behaviours in the organisation's webspaces, including a statement that the organisation will not tolerate illegal activities and ensuring that the policies are enforced;
- managing the organisation's webspaces and virtual spaces so that inappropriate behaviour and materials are promptly detected and dealt with, and ensuring that responsibility for the monitoring of the organisation's webspaces is given to a person with sufficient expertise;
- implementing systems for the prompt modification or removal of illegal or inappropriate material from the organisation's webspaces, including procedures for notification and removal of copyright infringing material;
- adopting specific terms of use or a code of conduct applying to the use of the organisation's webspaces, giving the organisation the discretion to exclude users from its webspaces for breach of the terms of use or code of conduct; and
- managing copyright and other intellectual property material contained within the organisation's webspaces, including the option of permitting reasonable use of copyright material under open content licences.

- [1.5] Organisations should be aware that by exercising a higher level of control over their webspaces and adopting a higher level of responsibility, they may be exposed to greater liability for the actions of Platform Users. This is because the organisation could be considered to have the ability to prevent or reduce the impact of any illegal acts of the Platform Users. However, courts are unlikely to accept an argument that a lack of monitoring absolves responsibility in relation to a limited web space such as a MySpace page, where monitoring can be more practically implemented. It will be better for an organisation—both in terms of its legal position and its public image—to take all reasonable steps in relation to monitoring online behaviour in its webspaces,

2 Introduction

Key Points

It is becoming increasingly important for public and private sector organisations to establish a presence in online social networking environments if they are to effectively communicate with many members of the public, particularly young people.

This Report considers three popular online social networking Platforms, namely:

- YouTube;
- MySpace; and
- Second Life.

As an overview, this Report examines legal aspects of the use of these Platforms by organisations to establish avenues of communication through online webspaces, identifies the risks associated with the Platforms and proposes strategies that can be implemented to minimise those risks.

Background

- [2.1] As Web 2.0 technologies proliferate, an increasing number of Australians, especially young Australians, are using information and communication technologies to engage and interact with each other. Information and communications technologies also

offer great opportunities for governments to engage with young Australians and the last decade has seen governments beginning to use these technologies to engage with different constituencies. In particular, governments are exploring the potential of digital and online technologies to communicate with young voters who have traditionally been perceived as apathetic or disillusioned with the parliamentary process.

[2.2] Increasingly, young voters feel that they cannot communicate with governments and with politicians. Young people often use online and digital environments—websites, bulletin boards, forums, social network platforms and virtual environments, instant messenger, SMS and Voice over IP—to converse with each other about things that are of importance to them. The topics of these conversations—education, the environment, policy, economics, human rights, sexual identity—are inherently politically relevant. Consequently, if governments are to have meaningful interaction with young people, it is important for them to engage in these communication platforms.

[2.3] Many organisations, both in the public and private sectors, are exploring the potential of wikis and blogs and an increasing number of government organisations are working to take advantage of the opportunities these new technologies can provide them. The Australian Labor, Liberal and Greens parties used YouTube to distribute their advertising clips in the recent NSW state election,¹ Sweden and the Maldives have embassies in the virtual world Second Life,² and all the current

1 Asher Moses, "Pollies chase the youth vote on MySpace" (2007) *The Sydney Morning Herald* <<http://www.smh.com.au/news/web/myspace-wants-to-bring-the-pollies-aboard/2007/05/29/1180205227617.html>> at 6 June 2007.

2 The Associated Press, "Second life for Sweden" (2007) *The Herald Sun* <<http://www.news.com.au/heraldsun/story/0,21985,21826434-661,00.html>> at 6 June 2007.

US presidential hopefuls have MySpace pages.³ MySpace Australia recently launched its 'Impact' political channel,⁴ and has actively encouraged Australian Federal politicians to use this forum for campaigning during the upcoming election, stating, "such non-traditional tools may soon be mandatory campaigning avenues, as younger voters become increasingly alienated from the political process."⁵

Overview of this Report

- [2.4] This Report has been prepared for Smart Service Queensland (SSQ), to address and explain the legal issues associated with its use of three popular online social networking environments—YouTube,⁶ MySpace⁷ and Second Life⁸ (which are referred to throughout this Report as the "Platforms"). These Platforms exemplify online participatory spaces and activities, including blogging and networking, multimedia sharing, and immersive virtual environments.
- [2.5] This Report begins with a short description of each of the Platforms and an overview of the legal issues common to all three. It then identifies and examines the legal issues, inherent risks and other issues for consideration which are particular to each separate Platform. Finally, the Report outlines some steps that organisations may take to reduce or eliminate the risks that may arise from engaging in activities in the Platforms. The Report also contains, in the Appendices, the Terms of Use (TOU) that set out the terms and conditions applicable to

3 Moses, above n 1. See MySpace pages of Barack Obama <<http://profile.myspace.com/index.cfm?fuseaction=user.viewprofile&friendID=164729>> at 1 August 2007; Hilary Clinton <<http://www.myspace.com/hillaryclinton>>; at 1 August 2007; Sam Brownback <<http://www.myspace.com/sambrownback>> at 1 August 2007.

4 Asher Moses, "Web wary Libs give MySpace a wide berth" (2007) *The Age* <<http://www.theage.com.au/news/web/web-wary-libs-give-myspace-a-wide-berth/2007/07/17/1184559752657.html>>

5 Moses, above n 1.

6 <<http://youtube.com>>

7 <<http://myspace.com>>

8 <<http://secondlife.com>>

participants in each of three separate Platforms.⁹

The Platforms

YouTube (<http://www.youtube.com>)

- [2.6] YouTube is a video sharing Platform that was launched in February 2005 and acquired by Google in 2006. While there are other online video sharing services, YouTube is by far the most popular and is arguably the leader in the field.
- [2.7] YouTube provides an online space where anyone can view video content or upload their own videos for others to view. The site's functionality allows Platform Members to engage with others by providing comments, reviews, ratings and video responses, or by creating channels or groups for particular topics.

MySpace (<http://www.myspace.com>)

- [2.8] MySpace is a social networking Platform owned by News Corp, which allows Platform Members to create individual profiles associated with a username. It is one of the most popular social networking websites, particularly among the youth audience. MySpace Australia has three million members, 50% of whom are under 25.¹⁰
- [2.9] MySpace offers an interactive, user-submitted network of friends, personal profiles, blogs, photos, music and videos. MySpace provides Platform Members with a different medium to interact with existing friends, as well as a way of meeting

⁹ While MySpace and YouTube have Terms of Use, Second Life uses an End User Licence Agreement (often abbreviated to EULA) for the downloadable interface program. For simplicity, throughout this report the Second Life EULA may also be referred to as TOU.

¹⁰ Moses, above n 1.

and communicating with new friends and acquaintances.

Second Life (<http://www.secondlife.com>)

- [2.10] Second Life is an online virtual environment developed by Linden Lab.¹¹ It is a free-form virtual world which allows a much wider range of interaction than other game-based environments such as World of Warcraft, The Sims Online, Habbo Hotel and the Lord of the Rings Online. Second Life differs from MySpace and YouTube in that it is a downloadable client program that enables Platform Members to interact within an immersive and persistent 3D virtual world.
- [2.11] Like more traditional social networking services, Second Life provides functionality such as user profiles, instant messaging and networking. However, Second Life also enables Platform Members to interact more fully in a virtual world by creating avatars, owning property, dealing in currency, building environments or objects, and interacting with the avatars of other Platform Members.

The Smart Service Queensland Project

- [2.12] SSQ is proposing to conduct the following kinds of activities on the Platforms:

YouTube

- distribute educational and informational videos;
- obtain feedback from users on these videos (via both comments and reply videos); and
- possibly, at a later stage, encourage users to post

¹¹ For an overview of Second Life, see Angus Kidman, *Virtual Worlds, Real Results*, Australian IT, 31 July 2007, available online at <http://www.australianit.news.com.au/story/0,24897,22158319-5013037,00.html>

their own material as part of competitions or festivals.

MySpace

- host a page providing information for the general public on SSQ and its services and/or individual projects;
- use the page as a central point for distribution of content including videos, audio (eg podcasts), dates and meetings;
- develop a contact list of interested parties ('friends') to whom this material will be distributed; and
- obtain feedback from users through the comments functionality.

Second Life

- acquire an 'island';
- develop 'public' areas on this island to provide information and content to members of the general public;
- host 'public' meetings, discussions and events on the island to showcase SSQ projects and obtain feedback on topical issues;
- use 'private' spaces on the island, that are accessible only to permitted users, for meetings between SSQ and members of the public with an existing relationship with SSQ (for example, for follow-up meetings to a youth roundtable); and

- possibly, permit members of the public to post their own material to certain areas of the island, such as via a comments area or gallery.

3 Relationships Among Platform Users

Key Points

To identify and address the legal issues that arise from use of the Platforms, it is necessary to understand the legal relationships that exist among the various parties who participate in activities on the Platforms.

There are legal relationships between: Platform Providers and Platform Members, Platform Providers and Platform Visitors, among Platform Members themselves and between Platform Users and third parties. The relevant parties are:

- Platform Providers;
- Platform Members;
- Platform Users (who may have joined as Platform Members or may merely be (non-member) Platform Visitors); and
- third parties – persons other than the Platform Provider or Platform Users who may nevertheless be affected by the activities carried out on the Platform.

The various relationships among these parties will give rise to different legal rights and obligations, some of which

12 While MySpace and YouTube have Terms of Use, Second Life uses an End User Licence Agreement (often abbreviated to EULA) for the downloadable interface program. For

are governed by the Platform's TOU,¹² while others are governed by the general law (statutory and common law).

In particular:

- the Platform Provider–Platform Member relationship is governed by the TOU and, where applicable, the general law;
- the Platform Provider–Platform Visitor relationship is usually governed by the general law;
- the Platform Member–Platform Member relationship is governed both by the general law and, indirectly, by the TOU by virtue of the fact that all Platform Members will have entered into a contract with the Platform Provider; and
- the Platform User–Third Party relationship is governed by the general law.

[3.1] To identify and address the legal issues that arise from use of the Platforms, it is necessary to understand the legal relationships that exist among the various parties who participate in activities on the Platforms. There are legal relationships between Platform Providers and Platform Members, Platform Providers and Platform Visitors, among Platform Members themselves and between Platform Users and third parties.

simplicity, throughout this report the Second Life EULA may also be referred to as TOU.

[3.2] These various relationships are governed by each Platform's specific TOU, as well as any applicable legislation (such as the *Copyright Act 1968*) and common law principles. The TOU may require all Platform Users to apply the rules set out in the TOU to their relationships with other Platform Users. However, where the use of an organisation's webspace in a Platform gives rise to a legal relationship between the organisation and a third party who is not a Platform User, there is no contractual relationship and the general law (whether statutory or common law) will apply.

[3.3] By engaging in activities on the Platforms, a Platform User enters into legal relationships with the following parties:

- 1 *the Platform Provider* – Google (YouTube), Yahoo (MySpace) or Linden Lab (Second Life);
- 2 *Platform Members* – persons who have joined the Platform as members, usually by agreeing to the Platform's TOU by means of a click-wrap agreement;
- 3 *Platform Visitors* – persons who use the Platform ('Platform Users') but have not joined as Platform Members; and
- 4 *third parties* – persons other than the Platform Provider or Platform Users who may nevertheless be affected by activities carried out on the Platform.

Platform Visitors

[3.4] For this Report, "Platform Visitor" includes any person who uses the Platform, but has not undertaken the additional steps required to become a Platform Member.

- [3.5] A typical Platform Visitor on YouTube will be any member of the public who views a video, but has not yet uploaded a video. It is a fair assumption that Platform Visitors make up the vast majority of people who use the YouTube service. Platform Visitors must become Platform Members if they want to give feedback (either as a comment or a “video reply”) on a video.
- [3.6] A typical Platform Visitor on MySpace is any member of the public who views a MySpace profile, but has not yet created their own MySpace profile. As MySpace is a social space for people who interact via their own webspace, it is assumed that there is a greater proportion of Platform Members than in YouTube. Again, Platform Visitors must become Platform Members if they want to give feedback on another MySpace profile.
- [3.7] Unlike YouTube and MySpace, there will be a very low proportion of Platform Visitors compared to Platform Members in Second Life. Most people who access the Second Life Platform will do so through the Second Life software, which requires the person to become a member of the Second Life service. However, there are “web portals” into Second Life, where a person can control an “avatar” through a web page. People who use these web portals without previously having created an avatar through the normal Second Life software will be Platform Visitors.

Platform Members

- [3.8] For this Report, “Platform Members” are persons who have taken the steps to gain membership to the Platform. This generally means creating an account on the service, which will include selecting a username and password, giving an email

address and some personal details, and then accepting the TOU in a “click through” or “click-wrap” contract.

- [3.9] As noted above, the incentive to become a Platform Member is the increased ability to interact with the Platform. On YouTube, only Platform Members may upload videos or make comments on other people’s videos. On MySpace, only Platform Members may create their own MySpace profiles or make comments on other profiles. In Second Life, the official Second Life software is only available to Platform Members, which includes the ability to create an avatar with which to view and interact with the virtual world.

Platform Users

- [3.10] Where there is no need to draw a distinction between a user of a Platform who is a Platform Member and a Platform Visitor, the term “Platform User” will be used. Every Platform User is either a Platform Member who has signed up to the Platform and has agreed to the TOU for the Platform, or a Platform Visitor who is unlikely to be bound by the TOU of the Platform.

Platform Providers

- [3.11] As the label suggests, the Platform Providers are the entities that provide (and therefore control) the Platforms. The Platform Providers for each of the three Platforms are:

- MySpace – News Corp;
- YouTube – Google, Inc; and
- Second Life – Linden Research, Inc (“Linden Lab”).

- [3.12] All three Platform Providers are corporations established under United States’ law.

Third Parties

[3.13] There is the potential for third parties, who are neither Platform Users nor Platform Providers, to be affected by actions on the Platform. Actions affecting third parties may be done by the organisation itself or other persons who act in response to the organisation's activities on the Platform. Examples of affected third parties include:

- the owner of a copyright song included in a training video which is uploaded to YouTube by the organisation's employee;
- a person who is defamed by a comment made in response to the organisation's publication on MySpace; and
- a person whose personal information is revealed in a conversation on a Second Life island owned by the organisation.

Relationship Between Platform Provider and Platform Members

[3.14] Typically, interactions between the Platform Provider and a Platform Member will occur where the Platform Member uploads new content to the Platform or makes a comment regarding existing content hosted on the Platform.

[3.15] The relationship between the Platform Provider and Platform Members will generally be governed by the Platform's TOU. The TOU is a click-wrap contract between the Platform Provider and Platform Members, which is entered into online by the Platform Members when they subscribe to the service. Among other matters, the TOU prescribes the acceptable uses

of the Platform by Platform Members.

- [3.16] However, in cases where the TOU do not apply or are inadequate, the relationship between the Platform Provider and the Platform Members will be governed by general law principles. Similarly, a court may choose to apply general law if they determine that it overrules or contradicts the TOU.

Relationship Between the Platform Provider and Platform Visitors

- [3.17] It is possible for a person to participate in Platform activities without becoming a Platform Member. Where participants do not become Platform Members by indicating acceptance of the terms of the online click-wrap agreement, they may still engage in Platform activities as Platform Visitors.
- [3.18] As a Platform Visitor has not indicated acceptance of the terms of the online click-wrap TOU agreement, their relationship with the Platform Provider will not be contractual and will instead be governed by the general law.
- [3.19] There is a possibility that where the Platform Provider has attempted to make the TOU visible to *all* users, such as in a link at the bottom of a page (“browse-wrap”), the Platform Visitor may have indicated assent simply by participating in the Platform. This is referred to as acceptance by conduct. If the courts uphold the validity of this kind of contract, the TOU will apply. However, the Platform Provider may have difficulty enforcing a browse-wrap agreement in light of the decision in *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768 (18 December 2006).¹³ In that case, the court emphasised the importance of bringing the terms of an

13 Also see discussion in [4.5].

agreement to the attention of web-users and indicated that a browse-wrap agreement, particularly one which is merely provided by a link at the bottom of a webpage, may not be sufficient to draw the terms to a user's attention and thus be enforceable.

Relationship Between Platform Members

- [3.20] Where a Platform Member uses the Platform to interact with another Platform Member, an indirect relationship occurs. The main example of this is where one Platform Member views material uploaded to the Platform by another Platform Member, then makes a response through the Platform.
- [3.21] The TOU is a click-wrap contracts which establishes a contractual relationship between the Platform Provider and Platform Members. While, there is contract between individual Platform Members, an indirect relationship is established because the TOU set out the general standards of behaviour that must be observed by all Platform Members. General legal principles will also operate where appropriate to govern direct relationships between Platform Members.

Relationship Between Platform Users and Third Parties

- [3.22] As discussed above, a legal relationship between a Platform User (and possibly a Platform Provider) and a third party will come into existence where the Platform is used to carry out an activity that affects the legal rights of the third party. There are many ways in which the legal rights of a third party may be affected by some use of the Platform. Examples of how this may occur include where a third party is defamed using the Platform, or where a third party's copyright material is uploaded

to the Platform without their authorisation.

- [3.23] In the absence of any contractual undertakings outside the Platform, the relationship between the Platform Users or Platform Providers and third parties is governed by applicable general legal principles (whether based on statute or the common law).

Issues For Consideration

The various relationships among parties that engage in, or are affected by, activities on the Platforms give rise to different legal issues and are subject to laws and regulations that vary according to the nature of the relationship (whether contractually under the TOU or through the operation of the general law).

Even where a Platform Visitor has not expressly consented to a Platform's TOU by entering into a click-wrap agreement, they may nonetheless be affected by the TOU and the actions of other Platform Users. This may be due to the Platform Provider attempting to bind the Platform Visitor by linking to the TOU in a browse-wrap form, or may also be due to the operation of general legal principles that will extend to Platform Visitors and third parties.

4 Platform Terms of Use – Common Issues

Key Points

Generally, Platform Members are required to enter into a TOU agreement with the Platform Provider.

The purpose of the TOU is to:

- set out the conditions of participation on the Platform;
- define the rights and obligations of the parties; and
- ensure that the Platform Provider can exercise control over the Platform at the Platform Provider's discretion.

The TOU may appear on the Platform's website in two forms:

- as a **click-wrap agreement**, which requires Platform Users to check a box or click an on-screen button or icon as part of the sign-up process; or
- as a **browse-wrap agreement** which is linked to at the bottom of each page of the Platform Provider's website, arguably in an attempt to bind those Platform Visitors who have not entered into the click-wrap agreement.

There may be some difficulties in enforcing browse-wrap agreements, particularly in light of the decision in *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768 (18 December 2006), which emphasised the importance of bringing the terms of a licence to the website user's attention.

In order to use all the features of the Platform, Platform Members are required to accept the terms of the TOU. This means that the only option they are given is to accept the existing terms in the agreement or refrain from using the Platform. There is no (or minimal) room for negotiation of these terms.

The common features of the TOU of each Platform are:

- limitation of the Platform Provider's liability for any damage incurred by a Platform User or a third party as a result of the Platform User's participation on the Platform;
- expressly placing all responsibility for user-uploaded content on the Platform User;
- indemnities from each Platform User against any loss, damage or claims arising from the use of the service or breach of the agreement;
- warranties from Platform Members that any uploaded material does not breach the legal rights of any other person, including copyright, contract and privacy rights;
- the Platform Provider can remove content at its discretion, including content that violates or

may violate any of the Platform Provider's acceptable use policies;

- the Platform Provider may terminate a Platform Member's account with or without notice, and sometimes without having to provide reasons;
- the TOU and any disputes arising between the Platform Provider and a Platform Member are governed by the law of the State of California; and
- the Platform Provider may alter the terms of the TOU at any time and such changes will be effective and binding upon the Platform Provider posting the amendments to the Platform website.

In addition to the TOU, Platform Members are subject to any applicable common law and legislative obligations.

- [4.1] Each of the Platforms has a TOU governing the relationship between the Platform Provider and Platform Members, setting out the conditions on which Platform Members are permitted to participate in Platform activities and defining the obligations of the Platform Provider and Platform Members.
- [4.2] This Chapter provides a basic overview of issues common to the TOU of each of the Platforms. More detailed analysis of the individual TOU of each Platform is provided in Chapters 7 to 9. The texts of the TOUs are set out in the Appendices.
- [4.3] It is standard industry practice for Platform Providers to require Platform Members to indicate their acceptance of click-wrap TOU agreements by checking a box or pressing a button as part of the sign-up process.

- [4.4] The TOU is also provided as a “browse wrap” licence which is linked to at the bottom of each page of the Platform Provider’s website, apparently with the intention of binding to the TOU even those Platform Users who have not entered into the click-wrap agreement. To illustrate, including a link to the TOU at the bottom of each page on the YouTube website may be seen as an attempt to impose the terms on casual viewers of YouTube videos (Platform Visitors).
- [4.5] This dual approach (displaying the TOU both in click-wrap and browse-wrap configurations to Platform Users) is evident in all three of the Platforms.¹⁴ Questions arise about the enforceability of such “click-wrap” or “browse-wrap” licences in view of contract law principles requiring the terms of an agreement to be brought to the contracting parties’ attention if they are to form part of the contract.¹⁵ From the recent decision of the Federal Court in *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768 (18 December 2006), it appears that Australian courts are more likely to enforce a “click wrap” agreement which has been viewed and agreed to, as opposed to a “browse wrap” licence which is merely provided by means of a link at the bottom of a webpage. The court in *eBay v Creative* emphasised the importance of bringing the terms of the licence to the attention of website users.¹⁶

14 See YouTube ‘Terms of Service’ 1.A. Your acceptance; MySpace ‘Terms of Use Agreement’ paragraph 2; Second Life ‘Terms of Service’ Introductory paragraph.

15 *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768 (18 December 2006).

16 *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768 (18 December 2006). Also see *Specht v Netscape Communications Corp*, 150 F Supp 2d 585 (SDNY 2001); *Hotmail Corp v Van\$ Money Pie Inc*, 47 USPQ 2d 1020 (1998); *Steven J Caspi v Microsoft Network*, 323 NJ Super 118 (1999); *I Lan Systems Inc v Netscout Service Level Corp*, (D Mass 2002); *Net2Phone Inc v Los Angeles Superior Court*, (Cal Ct App 2002); *Comb v Paypal Inc*, (ND Cal 2002).

- [4.6] It is important to note that while the TOU governs the relationship between the Platform Member and the Platform Provider and establishes the general legal background to the Platform Member's rights and obligations in relation to the Platform, it does not express the full extent of the legalities surrounding the Platform. In addition to the contractual provisions of the TOU, a Platform Member is subject to obligations arising under legislation or through the operation of principles of the common law. As is discussed in Chapter 3, the obligations imposed by legislative provisions or the common law are particularly relevant to the Platform Member's relationships with other Platform Users and Platform Members, and with third parties, as none of those relationships is directly governed by contract.
- [4.7] TOU agreements are standard form agreements, with little (if any) room for negotiation of their terms. Each potential Platform Member is presented with the option of either accepting the standard agreement or not using the Platform. These agreements are, accordingly, written in terms very favourable to the Platform Provider.
- [4.8] The principal purpose of each TOU is to set out in contractual form the rights and obligations of the Platform Provider and the Platform Members. They provide a means by which the Platform Provider can limit its potential liability by disclaiming implied warranties and can seek express warranties and indemnities from Platform Members.
- [4.9] The TOU agreements seek to ensure that the Platform Provider can exercise control over the Platform. This includes the rights to make changes to the service and to terminate the accounts of Platform Members with or without reason. The TOU also purport

to allow the Platform Provider to change the terms with little notice to the users. However, a recent US decision¹⁷ has stated that changing terms, despite a contractual provision allowing the Platform Provider to unilaterally change terms by merely by posting the new terms on a website, will not be valid unless Platform Users have been additionally notified of those changes. This additional notification could be made by an email to Platform Members notifying them of the changes, by an explicit notice on the website to Platform Users or during the log-in process by requiring Platform Members to agree to any new terms before allowing them into the Platform. In addition, the TOU intend to situate all disputes arising between the Platform Provider and Platform Members within the jurisdiction in which the Platform Provider is located. This may mean that any suits under the TOU must be brought within the home state of the Platform Provider.¹⁸ The validity of such suits is discussed further below.

- [4.10] Because TOU agreements usually place Platform Members in weaker legal positions compared to Platform Providers, it is critically important that organisations fully understand the terms of the agreements. What follows is a brief description of the main features that are common to the TOU of each Platform. Further discussion of variations between the Platforms' TOU is provided in Chapters 7-9. Detailed legal advice should be sought as to the exact extent of the risks associated with each TOU and how the TOU agreements will apply to the organisation in question.

17 See *Joe Douglas v United States District Court for the Central Court Of California and Talk America Inc.* USCA No. 06-75424 (9th Cir. July 18 2007) at <http://pub.bna.com/eclr/0675424_071807.pdf> 31 July 2007).

18 *Bragg v. Linden Research Inc.*, No. 06-4925 (E.D. Pa. May 30, 2007).

Indemnities and Warranties

- [4.11] To limit their liability, Platform Providers use the TOU to expressly place all responsibility for user uploaded-content on the Platform Member who uploads the content. The TOU of all three of the Platforms explicitly limit the liability of the Platform Provider to the extent permissible by law against any damages Platform Users or third parties incur as a result of the Platform User's use of the Platform, even if the Platform Provider was aware of the possibility of the damage.¹⁹ Furthermore, the TOU obtain extensive indemnities from each Platform User against any and all loss, damage or claims (including attorney fees) arising from their use of the Platform, their violation of the TOU and any violation of a third party right (for example, through a User Submission).²⁰
- [4.12] The TOU seek warranties from Platform Members that where the Platform Member uploads material to the Platform, it is legal to upload that material and that the Platform Member owns or has obtained all of the necessary rights or licences to not only upload the material but also to license the use of the material to the Platform Provider.²¹ Platform Members are also required to warrant that the material they upload does not violate the rights of any other person, including privacy rights, copyrights and contractual rights.
- [4.13] The warranties and indemnities given in the TOU ensure that if a Platform Member posts material which may expose the Platform Provider to liability, the Platform Provider can either join the Platform Member in any potential action (that is, make

19 See YouTube 'Terms of Service' 10. Limitation on Liability. MySpace 'Terms of Use' 13. Limitation on Liability; Second Life 'Terms of Service' 5.5.

20 See YouTube 'Terms of Service' 11. Indemnity; MySpace 'Terms of Use' 16. Indemnity; Second Life 'Terms of Service' 5.6 .

21 For example see YouTube 'Terms of Service' 6.B Your User Submissions and Contract.

the Platform Member a co-defendant who is liable), or independently seek to recover any loss it incurs. The warranties and indemnities also enable the Platform Provider to disclaim liability for both its own actions and for the actions of other Platform Users. For this reason, Platform Users and third parties may seek to bring claims against large targets like corporations or governments who are providing products or services through the Platform. As organisations will not be able to rely on the benefit of the indemnities in favour of the Platform Provider, it is important that they understand the potential exposure to liability that the use of these Platforms entails.

Removal of Content and Termination of Account

- [4.14] The TOU generally provide that the Platform Provider may remove any content at its discretion, including material which violates the Platform Provider's acceptable use policies. The clauses which grant this power to the Platform Provider are usually expressed so as to give the Platform Provider a very wide discretion. This is done to allow the Platform Provider to avoid liability by removing content which may or may not be objectionable.
- [4.15] The Platform Provider also reserves the right to terminate a Platform Member's account, permanently blocking access to the Platform. This can be done with or without notice and for any or no reason.²² Termination gives no right to refund or any legal recourse to the Platform Member.²³

22 See Second Life 'Terms of Use' clause 2.6; MySpace 'Terms of Use' clause 1.
23 Ibid.

- [4.16] While the TOU may be phrased to give broad discretionary powers to the Platform Provider, there is some question as to whether Platform Providers are able to terminate the agreements or confiscate virtual property for no legitimate reason under general legal principles. Clauses which purport to give this right could be void in certain circumstances because they are unconscionable.²⁴ In other cases, expulsion from the Platform may amount to interference with virtual property and expose the Platform Provider to potential liability.²⁵

Jurisdiction

- [4.17] All the Platforms are owned by US companies and are hosted in the US. The TOU for each of the Platforms states that, irrespective of conflict of laws principles, the agreement itself and any disputes arising between the Platform Provider and a Platform User are governed by the law of the State of California. The TOU for YouTube and MySpace provide that the matters will be dealt with exclusively in the courts of California. Second Life differs in that it provides for disputes to be finally settled not in Californian courts, but through arbitration in California (See [4.18], [4.95]). This means that if an organisation were to be involved in a legal dispute with any of the Platform Providers, under the terms of the TOU that dispute would be heard pursuant to Californian law and most likely be determined in California.
- [4.18] The TOU for Second Life and MySpace also provide a method by which any disputes arising under the TOU may be settled by binding arbitration in California (although by differing rules of

24 Dale Clapperton & Stephen Corones, 'Unfair Terms in "Clickwrap" and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152.

25 See for example *Bragg v Linden Research Inc*, No 06-4925 (United States District Court for the Eastern District of Pennsylvania, 30 May 2007).

arbitration). In relation to Second Life, arbitration does not limit a party's right to also seek injunctive relief in a court of "competent jurisdiction." MySpace is similar, but bestows this right to injunctive relief to MySpace only and not to a Platform Member. Clauses which attempt to limit the jurisdiction of courts will not always be enforceable, with courts often inclined to choose to exercise their jurisdiction to hear disputes regardless.²⁶

[4.19] For disputes between organisations and a Platform User, which are not governed by the TOU, it will often be unclear who has jurisdiction over the dispute. Internet jurisdiction is a complicated and unsettled area of the law and it is possible that an Australian organisation could be sued in another country. Generally there are four elements to jurisdiction:

- 1 Jurisdiction to adjudicate – whether the court has the authority to make a judgment regarding the dispute;
- 2 Choice of law – determining which law will be applied to resolve the dispute;
- 3 Choice of forum (forum non conveniens) – determining which forum (court) should hear the dispute; and
- 4 Recognition and enforcement of judgments – whether a court will enforce a foreign judgment.

[4.20] Arguably, a wide view of online jurisdiction was adopted by the High Court of Australia in *Dow Jones & Co Inc v Gutnick*.²⁷ This involved a defamation dispute in which the Court held that

²⁶ *Oceanic Sun Line Special Shipping Co In v Fay* (1988) 165 CLR 197 at 247-248; *Bragg v Linden Research Inc*, No 06-4925 (United States District Court for the Eastern District of Pennsylvania, 30 May 2007).

²⁷ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

jurisdiction with regard to materials published over the internet could be asserted in the place where the defamatory material is accessed or downloaded. This means that a person or organisation making material available online, including organisations, could potentially be sued in any jurisdiction where the Platform can be accessed.²⁸ This decision has been the subject of much criticism and it is unclear whether it would apply to other fact situations or areas of law.²⁹ However, it highlights the complexity of this issue and the potential reach of foreign law and foreign courts when individuals and organisations are utilising the internet.

[4.21] While it is not possible to be certain as to whether an organisation could be required to appear in other jurisdictions, it is clear that Queensland or Australian Federal courts would generally be prepared to adjudicate under Queensland or Federal law any dispute between an organisation and another Platform User.

[4.22] If a government organisation was to be sued in a foreign jurisdiction, the issue of foreign sovereign immunity would arise. The doctrine of foreign sovereign immunity provides that a foreign state is generally immune from the jurisdiction of the courts of another sovereign state. This state immunity developed as an “undisputed principle of customary international law” and the law of nations based upon core aspects of sovereignty applicable in common law, civil law and other judicial systems.³⁰ Any suit brought against a government organisation in a foreign jurisdiction could, potentially, be dismissed on the ground of foreign sovereign immunity.

²⁸ *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

²⁹ See for example Brian Fitzgerald, ‘Dow Jones & Company Inc v Gutnick: Negotiating “American Legal Hegemony” in the Transnational World of Cyberspace’ (2003) 27 *Melbourne University Law Review* 590.

³⁰ Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (2002) at 96.

However, most states do subject this immunity to a number of exceptions which could potentially limit its application, depending on the laws of the state in question and the exact facts of the case. The most relevant of these is likely to be the exception that allows cases to be brought against foreign states where the activity that the legal action is based upon is commercial in nature.³¹ Although being a member of MySpace and YouTube would be unlikely to be considered a commercial activity, purchasing a virtual island in Second Life could arguably satisfy this requirement. It would therefore be valuable for government organisations to investigate the doctrine of sovereign immunity further before entering into foreign dispute resolution with respect to its activities.

- [4.23] Finally, if the foreign court does decide to hear the case, there is still the question as to whether local courts will be willing to enforce it. They may choose not to do so, for example, on grounds of public policy where the law would conflict with established legal principles or even the constitution of the jurisdiction called on to enforce the foreign judgment. For example, in *Yahoo! Inc v LICRA*, the US District Court refused to uphold a French censorship ruling against eBay for speech that is legal in the US.³²

Changes to Terms of Use

- [4.24] Each of the TOU states that the Platform Provider may alter the terms at any time and that such changes will be effective and binding simply upon the Platform Provider posting the

31 See, for example *Intel v Commonwealth Scientific and Industrial Research Organisation and Microsoft v Commonwealth Scientific and Industrial Research Organisation*, No 06-1032, 06-1040 (United States Court of Appeals for the Federal Circuit, 14 July 2006).

32 *Yahoo! Inc v LICRA* 169 F Supp 2d 1181 (ND Cal 2001) (Nov. 7, 2001) <http://www.eff.org/legal/Jurisdiction_and_sovereignty/LICRA_v_Yahoo/20011107_us_distct_decision.pdf>.

amendments to the Platform website.³³ The legitimacy of these provisions is unclear; there is some recent authority which suggests that it may not be acceptable for a website operator to change TOU without sufficient notice.³⁴

- [4.25] The principles of contract law generally require that changes in contractual terms be brought to the attention of the parties if the parties are to be bound by them. In the context of the Platforms, this would require Platform Users to be provided with clear notice of changes and a direction to the updated TOU.³⁵ In view of the uncertainty about the enforcement of online agreements of this kind, the TOU should be regularly reviewed to ensure that no significant changes have been made or, if significant changes have been made, that those changes are acceptable to the Platform User.

Reliance on the TOU for Disputes between Platform Users

- [4.26] As a general rule, there is no direct contractual relationship between individual Platform Users, regardless of whether or not they are Platform Members or Visitors. The exception to this general rule would occur in Second Life where users may enter into contractual arrangements with each other for the sale, purchase and licensing of content. Nevertheless, where the participants are Platform Members, there is an indirect relationship between them through the obligations imposed on all Platform Members by the Platform Provider in the TOU or in

33 YouTube 'Terms of Service' 14. General; Second Life 'Introduction'; MySpace 'Introduction'.

34 See *Joe Douglas v United States District Court for the Central Court Of California and Talk America Inc.* USCA No. 06-75424 (9th Cir. July 18 2007) at <http://pub.bna.com/eclr/0675424_071807.pdf> (31 July 2007).

35 *eBay International AG v Creative Festival Entertainment Pty Limited* [2006] FCA 1768 (18 December 2006) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal_ct/2006/1768.html?query=ebay>

other acceptable use conditions.

- [4.27] In some cases, Platform Members may be able to rely on the benefit of warranties that other Platform Members give to the Platform Provider. However, this will only be possible if the TOU make it clear that the warranties are provided for the benefit of third parties. In most cases it is unlikely that third parties will be able to rely on warranties under agreements to which they are not a party. In the YouTube, My Space and the Second Life TOU, user warranties are only provided for the benefit of the Platform Providers and do not make any reference to being provided for the benefit of third parties.

Privacy Policies and User Details

- [4.28] In addition to the TOU, the Platform Providers also maintain Privacy Policies, which are included as browse-wrap agreements that are linked to on each page of their website. These Privacy Policies bind how the Platform Providers may use information provided to them by Platform Users.
- [4.29] In general, these Privacy Policies state that the Platform Provider will use the information provided to it as necessary to operate the Platform, including providing messages between Platform Users and contacting Platform Users for promotions.
- [4.30] The Privacy Policies all state that the Platform Provider will not disclose information that can be used to identify individual Platform Users (ie names, email addresses or other identifying characteristics) to any third party unless the disclosure is necessary:
- to conform to legal requirements or to respond to a subpoena, search warrant or other legal process, whether or not a response is required by applicable law;

- to enforce the Platform's TOU or to protect the Platform Provider's rights; or
- to protect the safety of members of the public and users of the Platform.

[4.31] They will also generally reserve the right to transfer personal information to a successor that acquires rights to that information as a result of the sale of the Platform.

Issues For Consideration

Where a Platform Provider has attempted to bind Platform Users to the Platform's TOU by both click-wrap and browse-wrap methods, issues will arise as to the effectiveness and enforceability of the TOU. The decision of the Federal Court in *eBay International AG v Creative Festival Entertainment Pty Ltd* [2006] FCA 1768 (18 December 2006) indicated that while a click-wrap agreement may be enforced, a browse-wrap agreement is less likely to be binding unless it can be shown that the terms have been properly brought to the website user's attention.

Although the TOU seem to govern all behaviour on the Platform, it is important to remember that principles of general law, whether arising under statutory provisions or the common law, will also apply.

There is no or very little room to negotiate the terms of the TOU. It is important to remember that these are written in terms very favourable to the Platform Provider. Additionally, the TOU allow the Platform Provider to

change the terms without notice and to make changes to the services and terminate accounts with or without reason.

Platform Providers obtain extensive warranties and indemnities from Platform Users. These include:

- a warranty that the uploading of material to the Platform is done so legally with all the necessary permissions;
- a warranty that any material uploaded does not violate the rights of any other person; and
- an indemnity against all loss, damage or claims arising from the use of the Platform, or a violation of the TOU or a third party right.

Platform Providers are given broad discretionary powers to remove content that violates their acceptable use policies and to terminate the accounts of Platform Members.

The TOU of each Platform states that, irrespective of conflict of laws principles, the TOU and any disputes between the Platform Provider and a Platform Member will be governed by the law of the State of California. The TOU also provide for settling disputes by binding arbitration.

The only direct contractual relationship established by the TOU is that between the Platform Provider and a Platform Member. Any disputes between a Platform Member and another (non-member) Platform User or a third party will be determined by the general law, not contract. For

disputes that are not governed by the TOU, it will often be unclear as to the law of which jurisdiction will govern the dispute.

5 Responsibility for Government Actions and Material

Key Points

The TOU of each Platform Provider requires a person or organisation submitting material to the Platform to agree to be solely responsible for any material that infringes or is in breach of a law.

Copyright

As far as copyright law is concerned, this TOU requirement means that Platform Members will have to obtain appropriate clearances (copyright, performer's rights and moral rights) for all materials submitted to the Platform. In some cases, a defence or exception to copyright infringement may apply or the Platform User may be operating under a statutory licence such as the statutory licence for use of material for the services of the Crown. Any permission obtained should be broad enough to cover all anticipated uses of the material, including downstream uses and sub-licensing.

The TOU of each Platform allows the Platform Provider to remove material from the Platform at the Platform Provider's discretion and, in cases of repeat infringement, to terminate the membership of the Platform Member. The TOU also set out notice and takedown procedures where copyright owners can submit a notification to the Platform's designated copyright agent if they believe that content on the Platform infringes their copyright.

Technological protection measures (TPMs) are apparent on all three services—YouTube and MySpace do not provide the ability for Platform Users to download videos or music that are streamed via the services and Second Life allows Platform Users to choose whether they permit copying of each discrete object or texture that they create or upload to the Platform. However, it is important to be aware that these TPMs can be circumvented, for example by software or by simply taking screenshots containing the copyright protected material.

Privacy

Privacy policies are implemented alongside the TOU to govern how Platform Providers use private information obtained from Platform Users. For privacy breaches by Platform Users it is necessary to look to the general law, including:

- the *Privacy Act* 1988 (Cth);
- in Queensland, the Queensland Information Privacy Principles; and
- the common law.
- In the United States, there are four torts of privacy:
 - public disclosure of private facts;
 - unreasonable intrusion on solitude;
 - publicity which presents the plaintiff in a false light in the public eye; and
 - appropriation of the plaintiff's name or visage.

In Australia, there is no generally recognised common law right to personal privacy, however cases such as *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001)* and *Grosse v Purvis [2003]* raise the possibility that such a right may develop under Australian law.

Defamation

Defamation law will be relevant if material posted to the Platform by a Platform User is likely to injure another person's reputation.

Breach of Confidence

It is also important for Platform Users to be careful that they do not breach any duties of confidence by disclosing information that is regarded as secret or confidential. For a government organisation, confidential information may include the names, addresses and purchasing habits of clients, where that information was initially given in confidence in a government survey.

Employee Actions

- [5.1] An organisation will be vicariously responsible for any actions by its employees in the scope of their employment. It is important for appropriate policies to be in place to ensure that employees do not unlawfully interfere with the rights of others when operating in virtual or online environments. The internet is often perceived as borderless and users operating in the online environment often do so with a false sense of anonymity. It is therefore particularly important that employees

are made fully aware of all policies relating to their behaviour and actions online. As an example of employee conduct policies, IBM has recently established a code of conduct for its employees who conduct business or customer meetings in Second Life, covering issues of behavior, personal appearance, avatar personalities and gestures, and circumstances for imparting confidential information.³⁶

Terms of Use

- [5.2] Under the TOU of each of the surveyed Platforms, ownership of material posted on the Platform vests with the original copyright owner, who may use the material outside the Platform as they see fit.³⁷ The Platform Provider reserves all rights in its own copyright material (for example, software), but provides such material to Platform Users or grants Platform Users a licence to use the material for their own personal use in connection with the Platform.³⁸
- [5.3] The MySpace, YouTube and Second Life TOU all include clauses in which the contributor (i.e. the person submitting content, as opposed to the Platform Member on whose page the content appears) agrees that they are solely responsible for any material they upload to the Platform and any consequences which may arise from the posting or publishing of the material.³⁹

36 See 'IBM Guidelines Govern Virtual Employees' *Sydney Morning Herald* July 27, 2007 at <<http://www.smh.com.au/news/Technology/IBM-Guidelines-Govern-Virtual-Employees/2007/07/27/1185339203502.html>> 31 July 2007).

37 YouTube 'Terms of Service' 5. User Submissions; MySpace 'Terms of Use' 6. Proprietary Rights in Content on MySpace.com; second Life 'Terms of Service' clause 3.2.

38 YouTube 'Terms of Use' 4. Intellectual Property; MySpace 'Terms of Use' 6.3 Proprietary Rights in Content on MySpace.com; second Life 'Terms of Service' clause 3.1.

39 See YouTube 'Terms of Use' 5. User Submission B.; MySpace 'Terms of Use' clause

- [5.4] The organisation will be responsible to each Platform Provider for all materials it uploads to the respective Platforms. It will generally not be contractually liable to the Platform Providers for material posted by third parties. However, this does not prevent an organisation from being liable under general legal principles for material posted by third parties. Responsibility for material posted by third parties is discussed further in Chapter 6.

Copyright

- [5.5] Copyright is the area of intellectual property law that deals with creative works. The categories of material protected by copyright include literary, dramatic, musical and artistic works, sound recordings, films and broadcasts. This means that almost any material which can be uploaded to or created within a webspace will be protected by copyright—including comments, songs, videos, the layout of the page and even the software that provides the Platform.⁴⁰
- [5.6] As such, one of the most important legal issues that will arise for an organisation when using the Platforms will be ensuring that the appropriate clearances have been obtained for any copyright material used that is not owned by that organisation. The exact rights granted to copyright owners by the Australian *Copyright Act 1968* vary between different categories of material, but in general include the exclusive right to reproduce,

7.2; Second Life 'Terms of Use' clause 1.3.

40 The principle exception to this rule is older material that had fallen out of copyright. Copyright only subsists for a limited amount of time. In the case of literary, dramatic, musical and artistic works the term of copyright protection is the life of the author plus 70 years (Copyright Act s33); for sound recordings, films it is 70 years from the year of first publication (Copyright Act ss93-94); for broadcasts it is 50 years from the year the broadcast was made (Copyright Act s95); for published editions it is 25 years from the year of first publication (Copyright Act s96) After this time, the material is no longer protected by copyright, and may be used without permission.

communicate, publish and perform the material. Others cannot undertake any of these actions with a copyright work without the copyright owner's permission, unless their use falls within one of the exceptions provided by the *Copyright Act 1968* (see [5.8] below). This means, for example, that if an organisation's employee or agent uploads a video to YouTube that contains another person's copyright material and they have not obtained the correct permissions from the copyright owner of that material, the organisation will almost certainly be liable for copyright infringement.

[5.7] It is therefore vital that organisations ensure that they obtain all necessary clearances for copyright material that they plan to post on a website. A failure to seek the permission of the relevant copyright owners could potentially result in an organisation having to withdraw the uploaded material, a Platform Provider removing the uploaded material, or even the suspension or revocation of the organisation's membership. An organisation also risks an action for copyright infringement being commenced against them. An example of this occurred when the United Kingdom Cabinet Office was forced to remove public service videos they had uploaded to YouTube after it was discovered that the videos contained copyright infringing material.⁴¹

[5.8] Under certain circumstances, one of the defences or exceptions to copyright infringement set out in the *Copyright Act 1968* may permit an organisation to use material without permission. The most commonly used of these are the fair dealing exceptions, which provide a defence to copyright infringement where an individual deals with copyright material in a way that is "fair" and is carried out for the purpose of and

41 Will Sturgeon, *YouTube blunder: Egg on face for Cabinet Office* (2007) silicon.com <<http://www.silicon.com/publicsector/0,3800010403,39161833,00.htm>> at 6 June 2007.

research or study;⁴² criticism or review;⁴³ parody or satire;⁴⁴ reporting news;⁴⁵ or judicial proceedings or professional advice.⁴⁶

[5.9] Of particular relevance to government use of copyright material is the statutory licence for use of copyright material for the services of the Crown.⁴⁷ Copyright is not infringed by use of material by government organisations (whether Commonwealth, State or Territory) if the use is made “for the services” of the government and arrangements for compensation are made or payment is made to a declared collecting society.

[5.10] However, as the *Copyright Act 1968* exceptions are judged on a case-by-case basis and can be difficult to interpret, it is by no means certain that they would apply to the government organisation's proposed activities. In most cases, they are less likely to apply to large-scale public uses such as government publicity campaigns or distribution online. For risk management purposes, it is therefore recommended that government organisations obtain direct permission from the copyright owners of any material they wish to use online.

[5.11] When obtaining permission or clearance from the copyright owner, the clearance must clearly include permission to reproduce, communicate and perform any copyright material. Ideally, the permission will specifically refer to (though need not be limited to) distribution of the material online. It should also be broad enough to cover any downstream uses that the government organisation wishes to make of the material, or

42 *Copyright Act 1968* (Cth) ss 40, 103C.

43 *Copyright Act 1968* (Cth) ss 41, 103A.

44 *Copyright Act 1968* (Cth) ss 41A, 103A.

45 *Copyright Act 1968* (Cth) ss 42, 103B.

46 *Copyright Act 1968* (Cth) ss 43, 104.

47 *Copyright Act 1968* (Cth) s183.

that are required under the TOU of the Platform on which the material will be uploaded (for example, the right to sublicense the material to YouTube and YouTube users). If the content contains more than one copyright work, the government organisation should ensure that it obtains permission from each copyright owner.

[5.12] In addition to clearance from copyright owners, organisations should also be aware of the need to ensure that the necessary permissions have been obtained for any related rights that may exist in the material, such as moral rights⁴⁸ and performers' rights.⁴⁹ This may require the organisation to obtain permission from performers who appear in the work, or consent from the original author (who may not be the copyright owner) for any potential infringements of their moral rights (namely their right to be accurately attributed and their right not to have their work subjected to derogatory treatment. This issue of moral rights will apply to material submitted and developed in all of the Platforms, but may be more important in some Platforms than others.

[5.13] An organisation could also be exposed to liability where one of its employees provides a link to a website containing infringing material. This occurred in the recent Federal Court decision of *Universal Music Australia Pty Ltd v Cooper* ("Cooper"),⁵⁰ where the court held that the proprietor of a website known as MP3s4free.com, on which users were able to post hyperlinks to websites that provided infringing copies of music, was liable for authorising infringement in relation to these links.⁵¹

48 Part IX, Copyright Act 1968.

49 Part XIA, Copyright Act 1968.

50 [2005] FCA 972 (Tamberlin J, 14 July 2005).

51 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, [85] (Tamberlin J, 14 July 2005).

- [5.14] Similar circumstances to those of the MP3s4free.com case are likely to be seen on MySpace and YouTube Platforms, as the primary purpose of these Platforms is to provide links between related content and Platform Users. However, it is unclear whether the MP3s4free.com reasoning would be held to apply in such Platforms—while there are similarities between the two situations (i.e. the provision of a link that assists others to infringe copyright), in the MP3s4free.com case the primary purpose of the site was to provide links to infringing material. Furthermore, the web proprietor of MP3s4free.com was not only aware of the infringing nature of the material being linked to, but actively encouraged its use and was obtaining a financial reward from running the site. Nevertheless, organisations may wish to ensure that their employees are aware of this risk, and put in place policies that address when it is acceptable to link to other websites.

Notice and Takedown

- [5.15] All of the Platforms surveyed contain provisions in their TOU that allow the Platform Provider to remove material posted to the Platform at their discretion and without notification to the contributor (whether the contributor is a Platform Visitor or Platform Member). The Platform Providers also maintain policies that Platform Members whose material is repeatedly found to be “infringing” will have their membership terminated—though they do not make it clear whether this refers only to copyright infringement (in line with the notice and takedown system discussed below) or more broadly to breaches of the TOU.

[5.16] Each of the TOU agreements (and in the case of Second Life, a separate procedure notice)⁵² also include a provision setting out the process for notification of copyright infringement, designed to implement the 'notice and takedown' provisions of the US *Digital Millennium Copyright Act 1998* (DMCA).⁵³ These provisions prescribe the procedure to be followed when material that infringes copyright is identified on an online service. If online service providers comply with these provisions, as well as meeting certain other legislative requirements, damages cannot be awarded against them for copyright infringements that occur on their services. As a result of the US Free Trade Agreement, similar provisions now also apply in Australia.⁵⁴

[5.17] As the notice and takedown procedures are set out in some detail in the DMCA, the TOU provisions implementing the system are essentially identical across all three of the surveyed Platforms. The provisions provide that if a copyright owner believes that content on the Platform infringes their copyright, they can submit a notification to the Platform Provider's designated copyright agent that:

- identifies the work or works that is claimed to have been infringed;
- identifies the material that is claimed to be infringing;
- is signed by and provides contact details for the copyright owner or their agent; and
- includes statements that the information in the notice

52 DMCA: Digital Millennium Copyright Act (*Second Life*),
<<http://secondlife.com/corporate/dmca.php>>

53 *Digital Millennium Copyright Act of 1998* s512.

54 Copyright Act 1968 (Cth) s116AH.

is accurate and that the sender has a good faith belief that use of the material in the manner complained of is not authorised by the copyright owner, its agent, or the law.

[5.18] Of the three Platforms surveyed, only Second Life spells out the process that will be followed on the receipt of the notice. However, as this process is prescribed by the DMCA, it is reasonable to assume that it will be the same across all three of the Platforms. Upon receipt of a valid DMCA notification, the Platform Provider must promptly take down the offending content. They must then take reasonable steps to contact the submitter of the removed content, informing them of the removal of the material and giving them an opportunity to provide a counter-notification. On receiving a valid counter-notification, the content will generally be restored unless the Platform Provider receives notification from the original complainant that a legal action has been filed seeking a court order to restrain the alleged infringer from engaging in the infringing activity.

[5.19] Organisations can use these procedures to have material removed from the Platforms, where they believe that the material infringes their copyright. Similarly, the procedures can be used by those wishing to have material removed from an organisation's webspace. It should be noted that under the DMCA provisions, the contributor is not provided with an opportunity to respond to the allegations of infringement before the material is removed. This means that an organisation's material could be removed from its webspace without the organisation being notified or given a right of reply. While it is possible for the organisation to have the material restored subsequent to its removal, this requirement is nevertheless concerning, as it is open to abuse by those wishing to have

material removed (eg from competitors' sites) even in the absence of copyright infringement. This has occurred, for example, in the case of a prominent Second Life community member, Ailin Graef, who in 2006 used the DMCA provisions to have screenshots and videos of her avatar, Anshe Chung, being attacked by flying representations of penises at a Second Life press conference removed from YouTube—even though the material was unlikely to be infringing under US law (see [9.25]).

Technological Protection Measures

- [5.20] Each of the Platforms surveyed in some way provides protection from copyright infringement by limiting the ability of others to reproduce material uploaded to the Platform. YouTube and MySpace, for instance, do not provide the ability for Platform Users to download videos or music that are streamed from the Platform. Second Life takes a more sophisticated approach, giving Platform Members the ability to allow or disallow copying on each discrete object or texture they create or upload.
- [5.21] It is important to note that these technical restrictions against copying will only provide limited protection against copyright infringement. A Platform User can still infringe copyright by taking a screenshot or making a movie which contains the material in question, or even by making an analogue or manual reproduction of the object. Copyright can also be infringed using software which bypasses these technical restrictions on copying. For example, programs that allow Platform Users to “grab” streamed material are commonplace, with this functionality even included in widely distributed commercial programs. A recent example of abuse of such a program occurred in 2006 when software called “copybot”, which was

originally created as a legitimate back-up tool, caused a great disturbance in Second Life by providing Platform Members with the ability to make copies of any objects which were displayed to them, regardless of whether the “no copy” flag had been set.⁵⁵

[5.22] Legal protection is available for the technological measures used by copyright owners to protect their material from copyright infringement under both Australian and US law. Both countries contain provisions in their Copyright Acts that essentially ban the circumvention of such measures, or the making or distribution of technologies designed to circumvent them, except in certain very limited circumstances.⁵⁶ However, while these laws would most likely work to protect the technological 'locks' provided by Second Life, it is less clear whether they would act to protect mere limitations on functions, as are used by MySpace and YouTube. Furthermore, these provisions will generally only apply where the technological measure is designed to prevent copyright infringement and will not prevent the distribution of technologies that have a number of legitimate uses other than the circumvention of a technological protection measure.

[5.23] This serves as a reminder that technical restrictions on copyright infringement are very unlikely to be completely

55 Copybot allowed users to create facsimile reproductions of their objects. It was able to do this through interfacing with Second Life directly, rather than using the official Second Life client software. Linden Lab has supported the development of third party software which is interoperable with Second Life, and have gone so far as to release the source code to the Second Life client in an open source manner.

When copybot was modified and began to be used to make unauthorised copies of restricted objects, the owners of virtual stores in Second Life became agitated, closing their stores in fear of losing their businesses. Linden Lab refused to close the source and interface to Second Life, restating its support for third party open source developers. It did, however, assure affected users that it would assist with any copyright claims that they wanted to lodge in court, and promised to ban users found using copybot in the future.

56 *Copyright Act 1968* (Cth) ss116AK-116AQ.

effective—if an object has to be transmitted to a person's computer in order for them to view it, it follows that there is normally a way for that person to ignore technical requests not to copy the object and to construct a digital reproduction or copy. Organisations should therefore not rely on technological protection measures inherent in a Platform to secure their intellectual property. If the content should not be available for widespread release, it should not be uploaded to the Platform at all.

Privacy

Terms of Use

- [5.24] Each Platform also provides a privacy policy along side the TOU.⁵⁷ These privacy policies govern how the Platform Provider will use any private information that is obtained from the Platform Users, but do not govern privacy breaches that might occur through use of the Platform by Platform Members. Accordingly, it is necessary to consider what legislative, administrative or common law principles apply to privacy breaches involving the Platforms.

Legislative and Administrative Principles

- [5.25] To address community concerns about unauthorised use of personal information, the Queensland Government has introduced a privacy scheme to be implemented in the public sector called the Queensland Information Privacy Principles (IPPs). The scheme, which is based on similar rules that apply to the federal public sector under the Commonwealth *Privacy*

57 See, for example <<http://www.myspace.com/Modules/Common/Pages/Privacy.aspx>>, <<http://www.youtube.com/t/privacy>> and <<http://secondlife.com/corporate/privacy.php>>.

Act 1988, ensures that Queensland government agencies respect personal information that they have access to about their constituents. The scheme creates strict rules about how personal information is collected, stored, accessed, updated, used and disclosed by the public sector. The aim is to protect both electronic and printed information about individuals from being lost, misused, inappropriately modified, or disclosed.

[5.26] As the Commonwealth *Privacy Act 1988* does not apply to state or territory governments or agencies, Queensland government organisations will need to ensure that they comply with these IPPs in the collection and distribution of any personal information via their webspaces. Personal information includes any information that would allow an individual to be identified.

[5.27] The eleven Queensland IPPs (adopted by the Queensland Government from the federal legislation) cover the following areas:

- Principle 1: Manner and purpose of collection of personal information;
- Principle 2: Solicitation of personal information from individual concerned;
- Principle 3: Solicitation of personal information generally;
- Principle 4: Storage and security of personal information;
- Principle 5: Information relating to records kept by record-keeper;
- Principle 6: Access to records containing personal information;

- Principle 7: Alteration of records containing personal information;
- Principle 8: Record-keeper to check accuracy etc. of personal information before use;
- Principle 9: Personal information to be used only for relevant purposes;
- Principle 10: Limits on use of personal information; and
- Principle 11: Limits on disclosure of personal information.

[5.28] As each of these principles is complex, the time and scope of this Report does not permit a full discussion of the details of their application. The Australian Government Office of the Privacy Commissioner explains each of these principles in detail on its website.⁵⁸

Common Law

[5.29] US torts law recognises four possible legal actions to protect privacy, including:

- Public disclosure of private facts – this legal action is available where there is a publication of facts which are “highly offensive” and objectionable to a “reasonable person of ordinary sensibilities”. This legal action is not available where there is a sufficient and legitimate public interest in disclosing the private information;⁵⁹

58 See <<http://www.privacy.gov.au>>

59 William Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383. Practically the First

- Unreasonable intrusion on solitude – this is a legal action which acts as a common law counterpart to the crime of stalking;
- Publicity which presents the plaintiff in a false light in the public eye – this legal action is available where the publication would be highly offensive to a reasonable person. The publisher must have known of, or recklessly disregarded, the falsity of the matter and the false light in which the person whose privacy is being breached would be placed. This legal action does not apply where the publisher can show that the publication was non-malicious and in the public interest; and
- “Appropriation” of the plaintiff’s name or visage.⁶⁰

[5.30] By contrast, Australian law has traditionally been regarded as containing no common law right to personal privacy.⁶¹ However, the possibility that a legal action to protect personal privacy could exist in Australia has been suggested on a number of occasions over the last 30 years, most notably by the Australian Law Reform Commission (ALRC)⁶² and by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (Lenah).⁶³ Most recently, the debate was reignited by the Queensland District Court case of *Grosse v Purvis* (Grosse),⁶⁴ in which the court chose to implement a

Amendment in the US has acted limit the application of this tort; however were such a tort recognised in Australia, it may prove to have more strength than its US counterpart.

60 These four torts were derived from the influential journal article: Samuel D Warren and Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193.

61 See for example *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, 521.

62 Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) [236].

63 (2001) 208 CLR 199.

64 [2003] Aust Tort Reports ¶81-706.

modified US-style action of unreasonable intrusion to provide damages to the mayor of a local council who suffered post-traumatic stress due to the persistent stalking and harassment by a former partner.

[5.31] Although the US actions for “public disclosure of private facts”, “publicity which presents the plaintiff in a false light in the public eye” and “appropriation of the plaintiff’s name or visage” are all likely to have broad applications in the online environment, these are not fully developed under Australian law. Therefore, it is unlikely that organisations will be held to have breached a person’s privacy through their actions in participating in a social networking site. The action most likely to be recognised by an Australian court, “unreasonable intrusion on solitude”, is unlikely to apply to online actions, as an internet based resource which is voluntarily accessed and read cannot be said to intrude upon the privacy and seclusion of a plaintiff.

[5.32] Actions that might be subject to an action for breach of privacy in the US context may, however, be subject to legal proceedings in Australia under the law of defamation or breach of confidence (see below), or passing off.⁶⁵ Furthermore, these US actions for breach of privacy are relevant as it is possible that a lawsuit will be filed in the US (or elsewhere) and determined under US law.

Defamation

[5.33] Defamation is an area of law which is particularly important on the internet. The ease with which users can make statements or comments about other people online, and the relative anonymity that the internet provides occasionally leads to

⁶⁵ See further *Talmax Pty Ltd & Anor v Telstra Corp Ltd* [1996] QSC 34; *Pacific Dunlop Ltd v Hogan* (1989) 23 FCR 553; *Honey v Australian Airlines Ltd* (1990) 18 IPR 185.

serious claims for damage to a person's reputation. Defamation is of particular interest to providers of internet services, because every person who is involved in the publication of a defamatory message can be liable for any damage that message causes.

[5.34] In the last few years, significant changes have been made to all defamation laws across Australia, which have resulted in largely standardised laws being established throughout all Australian jurisdictions. Under the new uniform Defamation Acts a plaintiff will have an action for defamation where they can establish that the defendant published a defamatory matter about them.⁶⁶

[5.35] Under these new laws, “published” includes publication over the internet.⁶⁷ Consequently, material uploaded by an organisation to a social networking site could give rise to an action for defamation, as long as it is found to satisfy one of the following three tests:

- 1 the material is likely to injure the reputation of the plaintiff by exposing them to ridicule, contempt or hatred;⁶⁸
- 2 the material is likely to make people shun or avoid them;⁶⁹ or
- 3 the material has the tendency to lower the plaintiff's reputation in the estimation of others.⁷⁰

66 *Defamation Act 2005* (Qld) s 6; *Defamation Act 2005* (NSW) s 6; *Defamation Act 2005* (Vic) s 6;; *Defamation Act 2005* (Tas) s 6; *Defamation Act 2005* (SA) s 6; *Defamation Act 2005* (WA) s 6; *Defamation Act 2006* (NT) s 5; *Civil Law (Wrongs) Act 2002* (ACT) s 118; Frances McGlone and Amanda Stickley, *Australian Torts Law* (2005) 379.

67 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

68 *Ettingshausen v Australian Consolidated Press* (1991) 23 NSWLR 449.

69 *Henry v TVW Enterprises* [1990] WAR 475.

70 McGlone and Stickley, above n 50, 380.

- [5.36] If an organisation is held to be the “publisher” of the material, it will be liable for the defamation. The exact meaning of the term ‘publisher’ in the online environment is currently uncertain, with no Australian cases and a number of conflicting international cases.⁷¹ However, in general it is interpreted broadly, where every person who contributes to the publication of a defamatory matter is potentially liable.⁷² The courts appear to determine the matter based primarily on how much control the person or entity in question has over the publication of the material. Significantly, in the context of providers of online services, omitting to remove or amend a defamatory matter that the service provider is aware of and that they have the ability to amend or remove will generally amount to a publication.⁷³
- [5.37] There are defences to defamation that may apply to an organisation engaging in activities in any one of the Platforms. These are discussed in Chapter 6, which relates more specifically to risks caused by third party actions or material, at [6.09] – [6.13].

Breach of Confidence

- [5.38] In posting material to their webspaces, organisations should take care to ensure that none of the information they provide could be said to attract a duty of confidence.⁷⁴ With regard to personal privacy, information that has a quality of confidence has been held to include personal affairs of prominent couples,⁷⁵ the content of illegally taped telephone

71 See *Bunt v Tilley & Ors* [2006] EWHC 407 and *Stratton Oakmont v Prodigy Services Co* 23 Media L Rep 1794 (NY, 1995).

72 *Webb v Bloch* (1928) 41 CLR 331.

73 *Byrne v Deane* [1937] 2 All ER 204, 210 (Slesser LJ).

74 *Coco v A N Clark (Engineers) Ltd* [1968] FSR 415.

75 *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

conversations,⁷⁶ and sexual relations between persons.⁷⁷ However, information of this nature will not have a quality of confidence where it is already in the public domain.⁷⁸ What constitutes the public domain is determined on a case-by-case basis, and will depend on the information disclosed.⁷⁹

- [5.39] A practical example of information that a government organisation is likely to have access to and that may attract a duty of confidentiality includes the names, addresses and purchasing habits of clients, where that information was initially given in confidence in a government survey. If a breach of confidentiality does occur, it is important that the purportedly confidential information is removed promptly and all steps are taken to limit its further dissemination.

Issues For Consideration

Any person or organisation who contributes material to a Platform agrees, under the TOU, to be solely responsible for the material and any consequences arising from the posting or publishing of the material. This limits the liability of the Platform Provider for any material that infringes copyright, is defamatory, or is otherwise offensive or illegal.

Where copyright material is uploaded to a Platform, it is important to ensure that:

- where copyright is owned by the organisation

76 *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408.

77 *Stephens v Avery* [1988] Ch 449.

78 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413.

79 See for example *G v Day* [1982] 1 NSWLR 24 where it was held the broadcast of personal information on two TV channels for a brief period did not constitute disclosure to the public domain.

that is uploading the material, the organisation has considered how they want to licence the material for use by other Platform Users; and

- where copyright is owned by another party, the organisation has obtained all the necessary permissions and clearances for use of the material.

Where an organisation wishes to use copyright material that is already on the Platform, it must ensure that:

- it has appropriate permission from the copyright owner; or
- it can rely on an exception to copyright infringement under the *Copyright Act 1968*; or
- it is acting under a statutory licence (eg where the organisation is a government organisation, it may be able to rely on the licence for use of copyright material for the services of the Crown).

An organisation must also take care that they are not seen to be authorising copyright infringement, for example by knowingly linking to a website containing infringing material.

The TOU give the Platform Provider the right to remove material posted to the Platform at their discretion and without notification to the contributor. Each Platform also sets out notice and takedown procedures for copyright infringement. Organisations can use these procedures to have material removed from the Platform, but the procedures can also be used against the organisation to

have material removed from the organisation's webspace. A contributor is not given an opportunity to respond to allegations of infringement before the material is removed. There is a risk that the notice and takedown procedures are open to abuse by people wishing to remove materials that may not actually infringe copyright.

Each Platform contains technology protection measures (TPMs) that prevent or limit the downloading of videos or music from YouTube and MySpace and the copying of certain objects and textures on Second Life. It is important to be aware that despite these TPMs, copyright can still be infringed by taking a screenshot or making a movie that contains the copyright material, by making a manual reproduction of an object, or through the use of software that bypasses the TPMs. Therefore, organisations should not rely on TPMs to secure their intellectual property—if the material should not be available for widespread release, it should not be uploaded to the Platform at all.

The privacy policies of the Platforms will only govern the use of private information by the Platform Provider, not by a Platform Member. Queensland Government organisations will need to comply with the eleven Queensland Information Privacy Principles (IPPs) regarding the collection, disclosure and use of privacy information. Additionally, although the Australian common law does not, at present, definitively recognise a right to personal privacy, it is important to be aware of the US torts of privacy, in case a breach of privacy action is brought under US law.

Care should be taken that statements made by employees or other people in the organisation's webspace are not

defamatory. There is a risk that defamatory statements may be made unwittingly (or even intentionally, with no expectation of being caught) due to the ease with which comments about other people can be made online and the relative anonymity that the internet provides. If an organisation is held to be the publisher of defamatory material, it will be liable. Importantly, if the organisation is found to exercise enough control over the web space, they may be liable for omitting to remove or amend a defamatory statement of which they were aware.

Finally, it is important that an organisation does not disclose confidential information on the web space. Organisations should identify confidential material in their possession and impose appropriate safeguards to preserve that confidentiality. If a breach of confidence does occur, the confidential material should be promptly removed and steps should be taken to limit its further dissemination.

6 Risks Caused by Third Party Actions on Material

Key Points

This chapter deals with situations where organisations could be held liable for the actions of third parties. Organisations may be responsible for the actions of employees under the legal principle of vicarious liability and may be responsible for the actions of users of their webspace, where the organisation is acting in concert with those users or has a right and responsibility of supervision.

Organisations will be liable for copyright infringing material posted on their webspace by third parties if the organisation is held to have “authorised” the infringement. Whether it has authorised the infringement is a question of the control exercised by the organisation over the webspace. For example, an organisation may be liable where they do not remove infringing material promptly or where they could easily and reasonably have prevented the infringing act but did not take any steps to do so.

Organisations may be liable for a defamatory statement made or defamatory material posted by a Platform User to a webspace that is controlled by them. Liability will arise where the organisation does not remove the material or does not limit that Platform User’s ability to enter the webspace and make defamatory statements (subject to any exceptions under US or Australian law for liability for defamation).

Finally, organisations may be liable where the webspace is used to make statements that are illegal under laws relating to:

- vilification on the grounds of race, religion, sexuality or gender;
- obscenity and indecency;
- blasphemous libel;
- pornography; and
- sedition.

Organisations should take reasonable steps to prevent the posting of offending material and to promptly remove any offending material that is posted to their Platform webspaces. The implementation of acceptable use policies can help to identify offending material and to make users aware of their position regarding such material.

General Liability

- [6.1] It is possible that, in some circumstances, organisations could be held liable for the actions of third parties under the general principles of civil or criminal law. This is most likely to be the case in relation to users of an organisation's services or where Platform Users post material to webspaces controlled by the organisation. For example, where an organisation's actions can be construed as encouraging its users to perform illegal acts, it may be liable for those actions either under the principle of vicarious liability as a joint tortfeasor, or criminally as a person who aids, enables, or procures another to commit an offence.

[6.2] Although an organisation is much less likely to be held liable for a Platform User's actions than an employee's, this may still occur in two broad situations:

- where the organisation can be said to be acting in concert with the Platform User in pursuit of an illegal act—for example, if a Platform User and an employee of the organisation were to conspire to defraud an unrelated participant;⁸⁰ and
- where an organisations is not directly involved in the civil or criminal wrong, but is seen as having the right, ability and responsibility to supervise the Platform User and the organisation fails to supervise—for example, if an organisation's employee provides users with tools which can be used to harm the interests of others and the employee fails to either monitor the use of the tools or properly warn against their misuse.⁸¹

Copyright

[6.3] Providers of interactive internet services have to be aware of the possibility of being held responsible for infringements of copyright carried out by their users. The major owners of entertainment copyright, the recording labels and film studios, are reluctant to sue users. Suing users is difficult, in that specific acts of infringement need to be proved, specific users need to be identified and served, and only a relatively small amount of money can be recovered. Copyright owners have

80 *King v Milpurrurra* (1996) 66 FCR 474 at 494.

81 *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 545 US 913, 930 (2005); also see *In re Aimster Copyright Litigation*, 334 F 3d 643, 645-646 (Cal 2003); Mark Radcliffe, 'Grokster: The new law of third party liability for copyright infringement under United States law' (2006) 22 *Computer Law and Security Report* 137, 144.

therefore recently favoured suing technology developers and service providers.⁸² Technology developers are in a key position because they can be forced to modify the software and hardware they distribute; service providers are important because they provide an identifiable point at which control can be exercised over a large number of users. For the same reasons, copyright owners may seek to sue other large targets in the environment—such as the government organisation responsible for the web space on which the material has been posted.

[6.4] Organisations will be liable for copyright infringing material posted by others on their web space (for example, as part of comments section or as part of an interactive project) where they are held to have “authorised” this infringement.⁸³ The term “authorise” has been held to mean to sanction, approve or countenance.⁸⁴ The factors a court will consider in determining whether a person has authorised an infringement include:

- the extent of the person’s power to prevent the doing of the act concerned;
- the nature of any relationship existing between the person and the infringer; and
- whether the person took reasonable steps to prevent or avoid the doing of the act, including whether the person complied with the relevant industry codes of practice.⁸⁵

82 See, for example, *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 545 US 913, 930 (2005); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242.

83 *Copyright Act 1968* (Cth) s 36(1) for ‘works’; *Copyright Act 1968* (Cth) s 101(1) for subject matter other than works.

84 *University of NSW v Moorhouse* (1975) 133 CLR 1, 12 (Gibbs J), 20 (Jacobs J); *WEA International Inc v Hanimax Corp Ltd* (1987) 10 IPR 349, 362 (Gummow J); *Nationwide News Pty Ltd v Copyright Agency Ltd* (1996) 34 IPR 53, 75.

85 *Copyright Act 1968* (Cth) ss 36(1A), 101(1A).

[6.5] A number of recent Australian cases, most notably *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (Kazaa)⁸⁶ have applied this test to hold service providers and website proprietors liable for material posted by their users. In each of these cases, the court based its decision on the fact that the service provider or website proprietor had the ability to control publication by their users. Importantly, this control does not have to be direct, but need only be the power to prevent, or at least to substantially reduce, the incidence of copyright infringement.⁸⁷ For example, in the Kazaa case the court found Sharman Enterprises liable for the actions of Kazaa users because they did not introduce technological filtering mechanisms such as keyword filtering or flooding⁸⁸ searches with known non-infringing or 'gold' files.⁸⁹

[6.6] Although the cases in this area have so far focused on Platform Providers such as Kazaa,⁹⁰ the Cooper case shows that Australian courts are willing to find those running webspaces liable for content posted by third parties where the court feels that there is a sufficient link between the proprietor and the infringement. The more closely linked an organisation is to the material or the Platform User and the more control it has over their actions, the more likely it is that an organisation will be held to have authorised the infringement. There is therefore a greater risk of an organisation being held to have authorised infringements that occur, for example, in a "private" Second Life island or meeting space accessible only to those

86 [2005] FCA 1242 (Wilcox J, 5 September 2005).

87 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (Wilcox J, 5 September 2005).

88 The process of 'flooding' refers to the listing certain files first upon processing a search query from a user such that other files are effectively flooded out of the search.

89 *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242 (Wilcox J, 5 September 2005) [411].

90 <<http://www.kazaa.com>>.

authorised by the organisation than in the comments or video-reply sections of a MySpace or YouTube page. However, as an organisation has the ability to remove comments and replies, there is still some risk that they will be held to have authorised infringing material that comes to their attention if they do not act to remove it promptly (see [10.6], [10.8] – [10.9]).

- [6.7] The Australian *Copyright Act 1968* does provide exceptions in ss39B and 112E which are designed to give legal protection to those who are merely providing services or facilities so that they are not held liable for copyright infringements performed by their clients.⁹¹ However, this defence was rejected in the Cooper case because the court held that the website proprietor had done more than “merely” providing a facility.⁹² As such, it is not clear that the defence would provide protection for organisations. Similarly, although there are safe harbours in the *Copyright Act 1968* for those providing online services, these will not provide a defence as they specifically apply only to “carriage service providers”.⁹³ While there is some debate as to the exact scope of the term “carriage service provider”,⁹⁴ it is clear that it would not apply to the person who merely operates the webspace. Interestingly, it is also uncertain whether online content delivery services such as MySpace and YouTube would be protected by these provisions in Australia, although they would almost certainly be protected under US law.⁹⁵

91 *Copyright Act 1968* (Cth) s 39B and 112E.

92 *Universal Music Australia Pty Ltd v Cooper* (with Corrigendum dated 19 September 2005) [2005] FCA 972 (14 July 2005) Tamberlin J at 99.

93 *Copyright Act 1968* (Cth) s116AA-AJ.

94 O'Brien, Damien and Fitzgerald, Brian (2006) Digital copyright law in a YouTube world. *Internet Law Bulletin* 9(6 & 7):pp. 71-74.

95 O'Brien, Damien and Fitzgerald, Brian (2006) Digital copyright law in a YouTube world. *Internet Law Bulletin* 9(6 & 7).

Privacy

- [6.8] As discussed above, it is unlikely that behaviour in the online environment would give rise to an action for breach of privacy in an Australian court. However, organisations do need to be aware of the US privacy torts as a cause of action could possibly be brought in the US (see at [5.29]-[5.32]).

Defamation

- [6.9] If a Platform User makes a defamatory statement in a webspace, that User will generally be considered to be the “publisher” of the information for the purpose of any action for defamation and therefore will hold primary legal responsibility. However, any person who has the ability to limit access to the space or remove the material once it is posted, such as the Platform Provider (eg Yahoo, Google or Linden Lab) or the manager of the webspace (eg the organisation), could also potentially be held liable. After all, the manager of the space, like the editor of a newspaper, ultimately has the ability to allow people to enter and make statements. On the other hand, unlike a traditional editor, the manager of the space will not always have the ability to determine the content of statements made by users in the space before they are published.
- [6.10] Under US law, it is likely that a party would be exempted from liability for defamatory comments posted by third parties to their webspace by the *Communications Decency Act* (US) 47 USC § 230 (1996) (CDA). The CDA states that ‘no provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another information content provider’.⁹⁶ The operation of this provision

96 *Communications Decency Act* (US) 47 USC § 230(c)(1) (1996).

was demonstrated in *Zeran v America Online Inc.*,⁹⁷ in which the court held that AOL was not responsible for an anonymous post on one of its bulletin boards containing a person's private home number. Recently, the Californian Supreme Court in *Barrett v Rosenthal*,⁹⁸ extended the reasoning in *Zeran*,⁹⁹ holding an internet user who posts material created by others to a website is immune from liability under the CDA as long as they make no change to the material. Under this decision, the CDA would apply even if government representatives had posted the content—as long as the material originated with another party and they did not alter or in any other way endorse or add to the material.

[6.11] Under Australian law there are a number of defences to a charge of defamation, including justification,¹⁰⁰ contextual truth,¹⁰¹ absolute privilege,¹⁰² qualified privilege,¹⁰³ honest opinion,¹⁰⁴ innocent dissemination,¹⁰⁵ and triviality.¹⁰⁶ The

97 [1997] 129 F3d 327.

98 40 Cal 4th 33 (Cal Sup Ct, Nov 20, 2006).

99 [1997] 129 F3d 327.

100 *Defamation Act 2005* (Qld) s 25; *Defamation Act 2005* (NSW) s 25; *Defamation Act 2005* (Vic) s 25; *Defamation Act 2005* (Tas) s 25; *Defamation Act 2005* (SA) s 23; *Defamation Act 2005* (WA) s 25; *Defamation Act 2006* (NT) s 22; *Civil Law (Wrongs) Act 2002* (ACT) s 135.

101 *Defamation Act 2005* (Qld) s 26; *Defamation Act 2005* (NSW) s 26; *Defamation Act 2005* (Vic) s 26; *Defamation Act 2005* (Tas) s 26; *Defamation Act 2005* (SA) s 24; *Defamation Act 2005* (WA) s 26; *Defamation Act 2006* (NT) s 23; *Civil Law (Wrongs) Act 2002* (ACT) s 136.

102 *Defamation Act 2005* (Qld) s 27; *Defamation Act 2005* (NSW) s 27; *Defamation Act 2005* (Vic) s 27; *Defamation Act 2005* (Tas) s 27; *Defamation Act 2005* (SA) s 25; *Defamation Act 2005* (WA) s 27; *Defamation Act 2006* (NT) s 24; *Civil Law (Wrongs) Act 2002* (ACT) s 137.

103 *Defamation Act 2005* (Qld) s 30; *Defamation Act 2005* (NSW) s 30; *Defamation Act 2005* (Vic) s 30; *Defamation Act 2005* (Tas) s 30; *Defamation Act 2005* (SA) s 28; *Defamation Act 2005* (WA) s 30; *Defamation Act 2006* (NT) s 27; *Civil Law (Wrongs) Act 2002* (ACT) s 139A.

104 *Defamation Act 2005* (Qld) s 31; *Defamation Act 2005* (NSW) s 31; *Defamation Act 2005* (Vic) s 31; *Defamation Act 2005* (Tas) s 31; *Defamation Act 2005* (SA) s 29; *Defamation Act 2005* (WA) s 31; *Defamation Act 2006* (NT) s 28; *Civil Law (Wrongs) Act 2002* (ACT) s 139B.

105 *Defamation Act 2005* (Qld) s 32; *Defamation Act 2005* (NSW) s 32; *Defamation Act 2005* (Vic) s 32; *Defamation Act 2005* (Tas) s 32; *Defamation Act 2005* (SA) s 30; *Defamation Act 2005* (WA) s 32; *Defamation Act 2006* (NT) s 29; *Civil Law (Wrongs)*

defence most likely to provide protection for organisations in the circumstances described is the defence of innocent dissemination. This states that it is a defence to the publication of a defamatory matter if it is shown that:

- the defendant published the matter merely in the capacity, or as an employee or agent, of a subordinate distributor;
- the defendant neither knew, nor ought reasonably to have known the matter was defamatory; and
- the defendant's lack of knowledge was not due to any negligence on the part of the defendant.¹⁰⁷

[6.12] A person will constitute a subordinate distributor if the person:

- was not the first or primary distributor of the matter;
- was not the author or originator of the matter; and
- did not have any capacity to exercise editorial control over the content of the matter (or over the publication of the matter) before it was first published.¹⁰⁸

[6.13] However, in *Thomson v Australian Capital Television Pty Ltd* (Thomson),¹⁰⁹ the High Court held that where a publisher has the ability to control and supervise the disseminated content, then the defence of innocent dissemination is not available.¹¹⁰

Act 2002 (ACT) s 139C.

106 *Defamation Act 2005* (Qld) s 33; *Defamation Act 2005* (NSW) s 33; *Defamation Act 2005* (Vic) s 33; *Defamation Act 2005* (Tas) s 33; *Defamation Act 2005* (SA) s 31; *Defamation Act 2005* (WA) s 33; *Defamation Act 2006* (NT) s 30; *Civil Law (Wrongs) Act 2002* (ACT) s 139D.

107 *Defamation Act 2005* (Qld) s 32(1).

108 *Defamation Act 2005* (Qld) s 32(2).

109 (1996) 186 CLR 574.

110 *Thomson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

It is therefore important that organisations take all care possible, as an institutional policy, to ensure that:

- when they learn of defamatory statements, they immediately exercise what control they have (if any) over the author to prevent those statements from being published;
- they do not turn a blind eye or tacitly allow defamatory statements to be made; and
- they do not republish any defamatory material—this includes, for example, in screenshots or video captures of Second Life material.

Other Laws

[6.14] Apart from defamation, there are a number of other areas of law (both civil and criminal) which restrict what people are allowed to say or depict. There are a number of sources of restrictions on the content of communications, including (but not limited to):

- vilification on the grounds of race, religion, sexuality, or gender;¹¹¹
- obscenity and indecency;¹¹²
- blasphemous libel;¹¹³

111 See, for example, *Racial Discrimination Act* 1975 (Cth); *Racial Hatred Act* 1995 (Cth); *Anti-Discrimination Act* 1991 (Qld); see further Electronic Frontiers Australia, “Racial Vilification / Hatred Laws in Australia” (2002) <<http://www.efa.org.au/Issues/Censor/rv.html>>

112 *Classifications (Publications, Films and Computer Games) Act* 1995 (Cth); *Classification of Films Act* (Qld); *Classification of Computer Games and Images Act* 1995 (Qld); *Classification of Publications Act* 1991 (Qld).

113 *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382; *Pell, Archbishop of Melbourne v Council of Trustees of National Gallery* [1998] 2 VR 391.

- pornography;¹¹⁴ and
- sedition.¹¹⁵

[6.15] Users of government webspaces may occasionally make statements which are illegal under these laws or under the laws of other countries. If users are making illegal statements, organisations may be held legally liable for their publication if the organisation knew about the statements and failed to take reasonable steps to stop them or remove the offending material. They may also be liable if they should reasonably have known that the statements were being made and did not act.

[6.16] Similarly to defamation, liability for offensive communications can be greatly limited by the implementation and enforcement of acceptable use policies. If users are found to be making offensive statements, they should be prevented from doing so on threat of ejection from an organisation's controlled space.

Issues For Consideration

There is a risk that an organisation could be held liable for the actions of third parties where:

- the organisation can be said to be acting in concert with the Platform User in pursuit of an illegal act;
- the organisation's actions can be construed as encouraging its Platform Users to perform illegal acts;

114 *Gypsy Fire v Truth Newspapers Pty Ltd* (1987) 9 NSWLR 382; see further MessageLabs and Freehills Brisbane, "Internet Pornography Laws in Australia" (2003) <<http://www.netalert.net.au/Internet%20Pornography%20Law%20in%20Australia.pdf>>.

115 *Criminal Code Act* (Qld); *Crimes Act* (Cth).

- the organisation is liable for the acts of employees under the legal principle of vicarious liability; or
- the organisation has the right, ability and responsibility to supervise the Platform User but fails to do so.

An organisation could be held responsible for copyright infringement carried out by their Platform Users. An organisation will be liable for copyright infringing material posted by others on their webspace (for example, as part of a comments section) where the organisation is held to have 'authorised' the infringement. The greater the control that is exercised by the organisation over the publication of material by its Platform Users, the greater the risk that the organisation will be considered to have authorised copyright infringement. Control does not have to be direct, but need only be the power to prevent, or at least to substantially reduce, the incidence of copyright infringement.

An organisation may be liable for defamation if it has the ability to remove defamatory material posted by third parties to its webspace, or to limit access to the webspace, and it does not act to remove the defamatory material expeditiously. There are defences to defamation under both US and Australian law that can be relied on by an organisation in these circumstances. However, the relevant Australian defence of innocent dissemination will not apply where a publisher has the ability to control and supervise the disseminated content. It is therefore important for organisations to ensure that they do not turn

a blind eye or tacitly allow defamatory statements to be made and do not republish defamatory material. When an organisation learns of defamatory statements, it should immediately exercise what control it has to prevent those statements from being published or to quickly remove the content from the webspace.

An organisation could also be liable for statements or postings by third parties that:

- vilify on the grounds of race, religion, sexuality or gender;
- are obscene or indecent;
- constitute blasphemous libel;
- are pornographic; or
- are seditious.

An organisation will be liable for illegal or offensive statements if the organisation knew about the statements and failed to take reasonable steps to stop the statements being made or to remove the offending content.

7 Specific Analysis – YouTube

Key Points

Platform Users retain all copyright and other ownership rights in video and text submitted to YouTube.

By submitting content, Platform Users automatically grant a non-exclusive licence to YouTube and other Platform Users to reproduce, distribute, prepare derivative works of, display and perform the submission.

The licences granted by Platform Users will not terminate once the Platform User's submission is removed from the YouTube website, but only after a "commercially reasonable time".

The YouTube TOU provides that the website must not be used for "prohibited commercial uses". This will usually mean generating access, subscription or advertising revenue from YouTube videos. Some limited commercial use is allowed, such as promotion of a business through a User Submission.

Platform Users cannot download "content" material, being material owned by or licensed to YouTube but not User Submissions, without the prior written consent of YouTube or the other owners of the content material.

The YouTube TOU provides that Platform Users must not use material that breaches the copyright, trade secret, proprietary, privacy or publicity rights of any third party.

This will require licences and consents to be obtained before any third party owner copyright material can be used in submissions to the YouTube website.

Platform Users are also required to avoid submissions that contain pornography or sexually explicit content, dangerous or illegal acts, graphic or gratuitous violence, hate speech or racist commentary, harassment or anything that invades another person's privacy. These kinds of submissions will be removed and the Platform User's account may be terminated.

According to the TOU, the YouTube website is not intended for children under the age of 13. However, there are no actual limits placed on minors accessing the website. An organisation should be aware, though, that YouTube could remove submissions or terminate accounts if it considers that a webspace is attracting Platform Users under the age of 13 years.

An organisation may be liable for infringing material posted on its webspace by third parties. This risk is most likely to arise where a 'reply video' is posted or comments are made by a Platform User. The comments and video reply functions can be disabled, but this would limit the extent to which Platform Users could engage with the organisation's webspace. The organisation should establish policies and systems for the prompt identification and removal of infringing or offensive material posted to the comments or reply video sections of the webspace.

Platform Users are required to agree to indemnify and hold harmless YouTube, its parents company, officers, directors, employees and agents from and against any claims, damages, obligations, losses, liabilities, costs, debt and expenses arising from the Platform User's access to and use of the YouTube website.

Ownership and Use of Materials on the YouTube Platform

- [7.1] **User Submissions:** Platform Users may submit video content and textual content which comments on videos submitted by other Platform Users. This video content and textual commentary comprise what is referred to as "User Submissions."
- [7.2] **Ownership of User Submissions:** As outlined at [5.2], the YouTube TOU state (in clause 6.C) that each Platform User retains all ownership rights in the User Submissions they make to YouTube.¹¹⁶
- [7.3] **Non-exclusive, royalty-free, worldwide licence to YouTube:** By making a User Submission to YouTube, the Platform User automatically grants to YouTube a worldwide, non-exclusive, royalty-free, sub-licensable and transferable licence which permits YouTube to use, reproduce, distribute, prepare derivative works of, display, and perform the submission at their sole discretion and for any purpose in connection with the YouTube website and YouTube's business operations, without limitation on commercial or non-commercial use.¹¹⁷ These broad rights of reuse include the promotion of YouTube (i.e. on

116 See YouTube – 'Terms of Service: 6.C – Your User Submissions and Conduct'.

117 See YouTube – 'Terms of Service: 6.C - Your User Submissions and Conduct'.

television, in newspapers etc) and redistributing the YouTube website (e.g. to mirror sites) in any media formats and through any media channels (online, broadcast, hardcopy etc).

[7.4] ***Licence to Other Platform Users:*** Each Platform User also grants to other Platform Users a broad non-exclusive licence not only to access and view their User Submission, but also to use, reproduce, distribute, prepare derivative works of, display and perform the User Submission “as permitted through the functionality of the YouTube Website and under these Terms of Service.”¹¹⁸ However, under Clause 5.B these uses may only be for personal use, excluding commercial use.

[7.5] ***Prohibited Commercial Use:*** Use of the YouTube Platform for “prohibited commercial uses” is not permitted.¹¹⁹ This means that any intentional attempt to generate access, subscription or advertising revenue from YouTube videos, whether on the YouTube site or another compilation site, or to establish a platform that uses YouTube User Submissions in order to compete with YouTube is prohibited.¹²⁰ Also, under clause 4.G., Platform Users cannot use the YouTube website to solicit other users for commercial purposes. However, Clause 4 does permit some commercial use, for instance where Platform Users promote their business through their User Submission on the YouTube website. It is also permissible to use the YouTube embedded player system to show a YouTube video on a blog site that has advertisements, as long as the primary purpose of using the embeddable player is not to gain advertising revenue or compete with YouTube.

118 See YouTube – ‘Terms of Service: 6.C - Your User Submissions and Conduct’.

119 See YouTube – ‘Terms of Service: 4’.

120 See YouTube – ‘What kinds of commercial uses of the YouTube website are prohibited, and which aren’t?’ at <http://www.google.com/support/youtube/bin/answer.py?answer=71011> (23 July 2007).

- [7.6] **Downloading and Re-Mixing:** Although the website does not currently include functions which enable the downloading or re-mixing of User Submissions, a re-mixing engine is being tested for possible release by YouTube (under the website “TestTube” page.) However, downloading and re-mixing is technically simple to achieve using external programs. Clauses 4.C and 5.B prohibit the use of such external downloading and re-mixing programs by only permitting access of User Submissions through the YouTube embeddable player and any other means authorised by YouTube. No other means have been generally authorised by YouTube at this time.
- [7.7] **YouTube Content:** Clause 5.A also refers to Platform Users downloading “Content” material. Content material is all material contained on the YouTube website owned by or licensed to YouTube, but does not include the User Submissions. Platform Users cannot download Content material without first obtaining the prior written consent of YouTube or the other owners of such material.
- [7.8] **Confidentiality:** YouTube does not guarantee any form of confidentiality with respect to submissions (clause 6.A). A submission can be accessed and viewed by any user of the YouTube website.
- [7.9] **Termination:** The licences over submitted material granted to YouTube and other Platform Users do not immediately terminate once the Platform User’s submission is removed from the YouTube website, but only after a “commercially reasonable time” (clause 6.C). This implies that YouTube could continue to make commercial or non-commercial use of a submission for its own reasons until it no longer required it, despite the Platform User’s termination.

Issues For Consideration

It is important for YouTube users to be aware that, despite retaining all of the ownership rights in their User Submissions, they grant to YouTube and to other Platform Users very broad licences to use their User Submissions.

YouTube can use any the User Submissions made by Platform Users in any way, whether commercially or non-commercially, for YouTube's business. For example, YouTube can create a YouTube 'promotional' DVD which reuses User Submissions and which YouTube could market commercially. Platform Users need to understand that they will not be paid any remuneration by YouTube for such use of their User Submissions.

The TOU permit Platform Users to reuse User Submissions within YouTube for non-commercial purposes, but only to the extent permitted by the YouTube functionality. This includes embedding the video into an external website, but does not currently include downloading or remixing the material (although it may at some point in the future).

In general, the TOU prohibit Platform Users from reusing User Submissions for commercial purposes, although minor commercial re-use outside the Platform through the embedded player is permitted.

Organisations must ensure that no confidential information has been inadvertently included in a proposed YouTube User Submission prior to being contributed to

the Platform. Organisations should institute a procedure for screening and cross-checking issues of confidentiality before material is submitted.

YouTube could continue to make commercial or non-commercial use of a User Submission for its own purposes until it no longer required it, even though the Platform User's access has been terminated.

Third Party Material and Limitations on User Activities

[7.10] **Third Party Material:** As a condition of making a User Submission to YouTube, Platform Users must not use material which infringes the copyright, trade secret, proprietary, privacy or publicity rights of any third party (clause 6.D). Material can only be used and submitted provided that either:

- the Platform User owns the material; or
- the Platform user has the permission of the third party owner to use it for the submission and to grant the necessary licences (to YouTube and other Platform Users) under the TOU.¹²¹

[7.11] **Community Guidelines:** Under the YouTube Community Guidelines¹²² which are incorporated into the TOU,¹²³ Platform Users must avoid submissions which contain pornography or sexually explicit content, dangerous or illegal acts, graphic or gratuitous violence or content of a shocking nature, hate

121 See YouTube - 'Terms of Service: 6.D. Your User Submissions and Conduct'.

122 See YouTube – 'YouTube Community Guidelines – Respect the YouTube Community' at < http://www.youtube.com/t/community_guidelines> (23 July 2007).

123 See YouTube 'Terms of Service: 1.A. Your Acceptance'.

speech or racist commentary, harassment or anything that invades a person's privacy or which reveals another Platform User's personal information.

- [7.12] **Technical Restrictions:** YouTube imposes a number of technical restrictions on how Platform Users may use the site's services, primarily aimed at limiting YouTube's liability in any legal actions. These include limiting the length of videos that may be uploaded to 10 minutes, which will limit the amount of copyright infringing material included on the website. In practice, they are of limited effect because much copyright infringing material will be shorter than 10 minutes (for example, video clips or excerpts from television shows) and because there are technological ways to circumvent this restriction.
- [7.13] **Age Restrictions:** Finally, it should be noted that the TOU states that the YouTube website is not intended for use by children under the age of 13.¹²⁴ However, as there are no actual limits placed on the website preventing access by minors, this statement seems to be intended primarily as guidance for those considering using the site. In practice, the website is commonly used by people of all ages. However, YouTube has recently taken action to close the accounts of "high profile" Platform Members who are under the age of 13.¹²⁵

124 See YouTube 'Terms of Service: 12. Ability to Accept Terms of Service'.

125 "Youtube Cracking Down on Child Users" Cnet Tech News Blog
<http://news.com.com/8301-10784_3-9747586-7.html> accessed 23/07/2007.

Issues For Consideration

Submitting Platform Users must have obtained all licences and consents to use all intellectual property rights, privacy and publicity rights which may be contained in material used in their submission. Organisations will need to have a system in place for comprehensively identifying and obtaining such permissions before a submission is made.

Despite the Community Standards being only guidelines rather than enforceable terms of the TOU, YouTube still has the power to remove submissions and to terminate accounts which breach these guidelines. Whilst this clause specifically identifies copyright infringement, violations of intellectual property, and pornographic, obscene or defamatory material as triggering the power of removal and termination, it goes on to state that the power of removal is not limited to these particular examples. This decision is at YouTube's complete and sole discretion, and a Platform Member whose account is terminated is prohibited from ever establishing another account again.¹²⁶

As discussed in Chapter 6, an organisation may, in certain circumstances, be held liable for material posted by third parties on its webspace. In relation to YouTube, this is most likely to occur in the context of a 'reply video' posted by a third party or comments posted to the page

¹²⁶ See YouTube 'YouTube Community Guidelines – Respect the YouTube Community' at <http://www.youtube.com/t/community_guidelines> (23 July 2007).

on which an organisation's video is posted. Although the YouTube TOU includes a number of indemnities (see below) and statements placing responsibility for material posted on the submitter, these are intended to protect YouTube from any liability and are not likely to provide legal protection for an organisation which receives video or commentary postings of infringing or offensive third party material on their webspace.

Given the sometimes arbitrary nature of YouTube's powers of removal and termination, organisations must establish practical systems to avoid removal, termination and legal liability. These would include systems for immediately removing infringing or offensive material posted to its comments section, or disabling links to video replies that may infringe rights or may be offensive. The risk of such material being posted may be reduced by incorporating, into its webspace, a policy of strict and discretionary removal of such material. As an extreme response, YouTube allows Platform Members to disable the comments and video-reply functions on their webspaces, however this would severely limit the usefulness of the site for obtaining feedback from Platform Users.

It is possible that YouTube may remove submissions or terminate accounts if it feels that a webspace is attracting Platform Users who are under 13 years of age. Again, an organisation may want to incorporate a policy of strict and discretionary removal into its Platform webspace for any video or commentary postings from persons under 13.

Indemnities, Liabilities, Modification and Dispute Resolution

[7.14] ***Indemnifying YouTube:*** As part of the TOU, YouTube users agree to indemnify and hold harmless YouTube, its parent company, officers, directors, employees and agents from and against any claims, damages, obligations, losses, liabilities, costs or debt and expenses arising from the user's access to and use of the YouTube website and any violations of the YouTube TOU or any third party right.¹²⁷ This includes indemnifying YouTube against any claims regarding damage to third parties caused by material which either:

- an organisation has submitted to YouTube; or
- Platform Users have posted to an organisation's Platform webpace.

[7.15] ***YouTube Not Liable:*** Under the YouTube TOU, YouTube are not liable to Platform Users for any defect in the YouTube website or any damage that Platform Users might incur as a result of using YouTube or making submissions to YouTube. YouTube is not liable for any User Submissions nor the defamatory, offensive or illegal conduct of any third party.¹²⁸ YouTube can discontinue any aspect of the YouTube Platform at any time.¹²⁹

[7.16] ***Modification of the TOU:*** YouTube has the right to modify or change the TOU at any time without reference to Platform Users. Under the TOU, Platform Users agree to be bound by such changes.¹³⁰ However, a recent US decision has raised doubts about the validity of such a clause¹³¹ (see [4.9]).

127 See YouTube 'Terms of Service: 11 Indemnity'.

128 See YouTube 'Terms of Service: 10 Limitation of Liability'.

129 See YouTube 'Terms of Service: 4.I. General Use of the Website – Permissions and Restrictions'.

130 See 'You Tube: Clause 1.B. – Your Acceptance'.

131 *Joe Douglas v United States District Court for the Central Court Of California and Talk America Inc.* USCA No. 06-75424 (9th Cir. July 18 2007).

- [7.17] ***Jurisdiction for Disputes:*** The TOU are governed by the laws of the State of California.¹³² If any dispute arises between a Platform User and YouTube, Platform Users agree to have that dispute heard by a court of competent jurisdiction located in California¹³³ and also agree that any cause of action which may arise must commence within one year after the cause of action accrues.¹³⁴

Issues For Consideration

Organisations must realise that in practice, YouTube has the right to recover from that organisation any damages that may have been awarded against YouTube which arose from the organisation's use of the YouTube website, the organisations submission or the posting of third party material to the organisation's webspace, even if there is no fault on the organisation's behalf.

Organisations must bear the risk of any inconvenience or damage that they might incur as the result of establishing a webspace on YouTube, such as any technical failure of the YouTube website which might prevent access to the organisation's webspace or any defamatory or contentious allegations that the organisation might receive from third party videos or commentary postings.

Organisations must also accept the risk of the TOU changing at any time and without notice and again may want to regularly monitor the TOU to be immediately informed of any changes or modifications to its terms.

¹³² See YouTube 'Terms of Service: 11 General'.

¹³³ Ibid.

¹³⁴ Ibid.

Contesting any disputes (such as appealing a decision by YouTube to remove or suspend an account) may be financially prohibitive because an organisation would have to engage legal counsel in California to represent the matter. In any event, the no liability provisions of clause 10 and the discretionary removal and termination provisions of clause 7 would reduce an organisation's chances of successfully disputing a matter. Organisations might want to obtain legal advice on whether the prohibitive one year enforceability timeframe can be contested under relevant limitation of actions law (whether in the organisation's home state or under Californian law) and the costs of such an exercise.

Summary of Potential Risks for Organisations Under YouTube

Potential Risks

- breaches of third party confidentiality and privacy rights;
- breaches of third party copyright and intellectual property rights;
- liability for defamatory or offensive statements in submissions or third party postings and/or removal of submissions and termination of YouTube account by YouTube;
- removal of submissions or termination of account if used by persons under 13 years of age; and

- YouTube can use submissions for any purpose without accountability to the submitting user and other Platform Users can reuse submissions for non-commercial and minor commercial purposes.

Proposals for Risk Minimisation

- crosschecking of issues of confidentiality;
- systems for identifying and obtaining permissions to use third party copyright, intellectual property and to obtain consent to potential infringement of third party privacy rights;
- systems for screening out, monitoring and immediately removing infringing, defamatory or offensive material, combined with webspace policies of strict and discretionary removal; and
- Systems for screening out, monitoring and immediately removing videos or commentary postings from persons under the age of 13.

8 Specific Analysis – MySpace

Key Points

The original creator retains copyright in material posted to MySpace but grants to MySpace.com a limited, royalty-free licence to use the material in relation to its services. This does not grant a licence to other Platform Users, in fact MySpace specifically prohibits Platform Members from using content posted by other Platform Users.

The MySpace TOU prohibits the uploading of patently offensive material, racist material and spam and bans any content that solicits personal information from anyone under 18. It also specifically prohibits the inclusion of email addresses, telephone numbers, street addresses and URLs on MySpace pages, although it seems that in practice this prohibition is generally not enforced.

The MySpace TOU bans Platform Members from using the MySpace services in connection with any commercial endeavours. Arguably, this would prohibit a Platform Member from using their MySpace page to host advertising that has not been approved by MySpace or to solicit payment from Platform Users.

A Platform Member, including an organisation, could be held liable for third party material posted to their MySpace page, most likely where infringing, illegal or offensive material is posted to the comments section of

the page. The MySpace TOU states that the Platform Provider takes no responsibility for monitoring material posted by users. To limit liability, an organisation should:

- have policies in place for the prompt removal of offending content; and
- consider taking steps to monitor content posted to their MySpace page.

The MySpace TOU states that any disputes about or involving the MySpace Services are to be resolved under the law and in the courts of California. It also gives either MySpace or the Platform User the right to bring the dispute before arbitration under the procedures of the American Arbitration Association.

Use of Government Material and Commercial Use

[8.1] **Ownership in Content:** The MySpace TOU state that Platform Users of MySpace who post material such as images, text photos and videos (“Content”) to the MySpace website continue to retain all ownership rights (for example, copyright) in that Content.

[8.2] **Licence to MySpace:** The TOU states that by posting Content to MySpace, users grant MySpace a non-exclusive, limited, royalty free licence to use the Content in relation to the MySpace services.¹³⁵ Unlike YouTube, the MySpace TOU explicitly state that this licence does not permit MySpace to sell the Content or to distribute it outside their own services,

135 See MySpace ‘Terms of Use: Clause 6.1 Proprietary Rights in Content on MySpace.com’.

although it does allow them to sublicense the material to their affiliates or subcontractors (for example, Internet Service Providers) where necessary to perform MySpace functions.¹³⁶ This licence terminates if the Content is removed from MySpace.

[8.3] **MySpace Content:** MySpace also grants Platform Users a limited, revocable, non-sublicensable licence to reproduce and display Content owned by MySpace solely for viewing the MySpace website and using their services. This would include the MySpace copyright protected website layout and trademark logos and is separate from the Platform Member Content.

[8.4] **Prohibition on User Reuse:** Unlike YouTube MySpace specifically prohibits Platform Users from copying, re-using or selling any Content posted by other Platform Users, and does not grant Platform Users a licence to reproduce, distribute or re-mix other Platform Users' content in any way.¹³⁷

[8.5] **Commercial Use:** While MySpace places advertisements on its website, it specifically bans Platform Members from using its Platform "in connection with any commercial endeavours except those that are specifically endorsed or approved by MySpace.com".¹³⁸ MySpace reportedly has technical measures in place that prevent people from uploading links or material from certain of the more popular "commercial use" websites such as Revver.¹³⁹

136 Ibid.

137 MySpace 'Terms of Use: Clause 6.4 Proprietary Rights in Content on MySpace.com'.

138 MySpace 'Terms of Use: Clause 5 Non-Commercial Use by Members'.

139 Daniel Terdiman 'MySpace banning Revver?' (*CNET News.com*)
<http://news.com.com/8301-10784_3-6024890-7.html>

Issues For Consideration

Unlike the YouTube TOU, the MySpace TOU limit MySpace's licence to use submitted Content to the functionality of the MySpace website, and not for the further promotion of the MySpace business.

Unlike the YouTube TOU, the MySpace TOU's prohibition on Platform User reuse means that organisations will not inadvertently grant others Platform Users a licence to re-distribute or remix posted Content.

The TOU does not define "commercial endeavours". However, it is likely that the prohibition on such activities would, for example, prohibit a Platform Member from using their MySpace page to host third party advertising not sanctioned by MySpace (for example, as part of a video) or to solicit payments from Platform Users. A government organisation's webspace may include references to the services it provides and links to other organisations which might be regarded as promoting commercial services. Organisations should ensure that they obtain express approval from MySpace to promote any services on their webspace and to incorporate any promotion or advertising of ancillary services.

Third Party Content and Limitations on User Activities

- [8.6] **Third Party Material:** Under Clause 6.2., Platform Members warrant that they either own their posted Content or that they have the rights to grant a licence to MySpace to use the Content for the purpose of the MySpace services. Clauses 6.2

and 9 of the MySpace TOU provide that users must not post or reproduce material which breaches the copyright, trade secret, proprietary, contractual, privacy, publicity or any other rights of any third party. Material can only be used where the user has first obtained the written consent of all relevant third parties to use that material in posted Content.

- [8.7] **Third Party Postings:** It should be noted that the MySpace TOU specifically state that MySpace assumes no responsibility for monitoring or removing inappropriate Content¹⁴⁰ and does not endorse and has no control over the Content.¹⁴¹ Platform Users are solely responsible for any Content which they post and “any material or information that you transmit to other members and for your interactions with other users”.¹⁴² Third party postings to a website could constitute “material or information” that is “transmitted” to other members or “interactions” as any visitor to the webpage can read these postings or add a comment in reply to a posting.
- [8.8] **Prohibited Content:** The TOU prohibits the uploading of certain Content to a MySpace page, including “patently offensive” material, racist material and spam,¹⁴³ and reserves the right to suspend, terminate or take legal action against any Platform User who breaches these content prohibitions. For a full list of prohibited material see the TOU at Appendix B. Whether content is “prohibited” can be determined solely at the discretion of MySpace.
- [8.9] **Age and Personal Information Restrictions:** Of particular note, the TOU specifically bans persons under the age of 14 from becoming a MySpace Platform Member and prohibits the

140 MySpace ‘Terms of Use: Clause 7.1 Content Posted’.

141 MySpace ‘Terms of Use: Clause 7.2. Content Posted’.

142 MySpace ‘Terms of Use: Clause 7.2 Content Posted’.

143 MySpace ‘Terms of Use: Clauses 7 Content Posted and 8 Content/Activity Prohibited’

use of any Content that solicits personal information from anyone under 18.¹⁴⁴ The TOU also specifically prohibits any Content that includes email addresses, telephone numbers, street addresses and URLs on MySpace pages.¹⁴⁵

Issues For Consideration

Organisations who submit Content must have obtained all necessary licences and consents to use all intellectual property and privacy rights which may be contained in material used in their Content. Organisations will need to have a system in place for comprehensively identifying and obtaining such permissions before Content is submitted.

As discussed in Chapter 6, under certain circumstances, organisations may be held liable not only for the Content which they post but also for third party Content posted to its MySpace webpage in the friends comments section, where that material breaches general law or the prohibited content terms. This is likely to occur in the context of an embedded video or comments posted by a third party to an organisation's MySpace webpage.

In relation to such infringing or prohibited Content, MySpace still has the right under the TOU to, at its sole discretion, remove the material and restrict or terminate Platform User access to the website for any reason, without notice and without liability.

144 MySpace 'Terms of Use: Clause 8.5 Content/Activity Prohibited'.

145 MySpace 'Terms of Use: Clause 8.6 Content/Activity Prohibited'.

Organisations should establish systems for immediately removing infringing or offensive material posted by third party users to its webpage. The risk of such Content being posted may be reduced by including a clear policy of strict and discretionary removal on the MySpace webpage.

An organisation also has the option of disabling the comments functionality of its MySpace page. Although MySpace does not directly permit comments to be disabled, this can be done by requiring comments to be approved before they are published or manually removing the comments HTML from the page. However, this would substantially restrict the functionality of the MySpace page, and the ability of organisations to obtain feedback from users.

There is no explicit prohibition in the MySpace TOU on imposing terms on others' use of a Platform User's page, or entering into an agreement with other Platform Members. Organisations could attempt to limit liability by including a code of conduct, terms of use or an indemnities clause on its MySpace page, by including text in the comments section setting out the organisation's acceptable standards for posted Content. These standards could require that Content submitters abide by the MySpace TOU in relation to infringing or offensive Content and as a final safeguard, require an indemnity from Content submitters for any infringing or offensive material.

Whether such terms or clauses, which do not permit negotiation or require assent, would be valid are discussed at [4.5]. Organisations must at least ensure that such codes, terms or indemnity clauses are clearly and prominently brought to the attention of all users of the organisation's MySpace webpage.

The restriction on soliciting personal information from people under 18 years of age may be intended to prevent Platform Members from providing other people's contact details, and to discourage minors from posting details which may identify them. It may also limit the ability of organisations to gather statistical data about Platform Users who access the organisation's webpage. For example, a MySpace page cannot be used to collect identifying information (such as email addresses to create a mailing list) from Platform Users who are under 18 years of age. MySpace's messaging functionality can still be used to provide "bulk" mail outs to any other Platform Users who are registered as an organisation's "friend".

However, as drafted the TOU's reach is far broader, and may prohibit the inclusion of details on how your organisation may be contacted or URL links to official websites. In practice it seems that the impact of the provision is minimal. A brief perusal of MySpace pages indicates that it is common for people and organisations to provide URLs without being expelled or having their material removed by MySpace. MySpace may decide not to exercise their discretion to remove such material and an organisation may wish to obtain express permission from MySpace for the inclusion of contact details and URLs, given that this information is provided to facilitate the legitimate purposes of a government agency.

Indemnities, Liability, Modification and Dispute Resolution

[8.10] ***Indemnifying MySpace:*** As part of the MySpace TOU, Platform Users agree to indemnify and hold harmless MySpace and its officers and employees from any losses or claims that may arise out of the Platform User's use of the MySpace website in breach of the TOU or if a Platform User's Content posting causes MySpace to be liable to a third party.¹⁴⁶ This will include indemnifying MySpace against such claims caused by Content which either:

- an organisation has submitted to MySpace; or
- other Platform Users have posted as friends commentary to an organisation's Platform webspace.

[8.11] ***MySpace Not Liable:*** Under clauses 12 and 13 of the TOU, MySpace is not liable to Platform Users for any use of the MySpace website or for any technical malfunction of the MySpace services or any damage that Platform Users might incur as a result of using MySpace or posting Content to MySpace. MySpace attempts to limit any such liability to the amount paid by the Platform Member for MySpace services during the term of the Platform Member's membership.

[8.12] ***Modification of the TOU:*** MySpace has the right to modify or change the TOU at any time without reference to Platform Users. Under the TOU, Platform Users agree to be bound by such changes.¹⁴⁷ However, please note the recent US decision about the validity of such a clause (see [4.9]).¹⁴⁸

¹⁴⁶ MySpace 'Terms of Use: clause 16 Indemnity'.

¹⁴⁷ See MySpace.Com – 'Terms of Use' 4th paragraph.

¹⁴⁸ *Joe Douglas v United States District Court for the Central Court Of California and Talk America Inc.* USCA No. 06-75424 (9th Cir. July 18 2007).

- [8.13] ***Jurisdiction for Disputes:*** Like YouTube, the MySpace TOU are governed by the law of California. The TOU also gives either MySpace or the Platform User the option to bring the dispute before arbitration under the procedures of the American Arbitration Association. However, going to arbitration does not prevent MySpace from seeking an injunction before the courts to restrain the Platform User from actions in relation to the website.

Issues For Consideration

Like YouTube, MySpace has the right to recover damages that may be awarded against MySpace which arise out of the organisation using the MySpace website in a way which breaches the TOU, the organisation's posting or third party postings to the organisation's MySpace page.

As in YouTube, organisations must accept the risk of any inconvenience or damage resulting from their use of the MySpace website, including any technical failure, or any defamatory or contentious allegations that an organisation might receive from third party postings. It is questionable whether a court would agree that MySpace's liability for damages would be limited to merely the refund of membership fees.

Organisations must also accept the risk of the TOU changing at any time and without notice. Organisations should regularly monitor the TOU to be immediately informed of any changes or modifications to its terms.

The jurisdiction clause intends to be financially prohibitive because an organisation would have to engage legal

counsel in California to contest a dispute. Arbitration can be instituted by only one party and organisations may be prevented from bringing a court action if MySpace chooses to have a dispute heard in arbitration. It should be noted, however, that such a clause which purports to exclude the jurisdiction of the courts may be held in certain circumstances to be unenforceable.¹⁴⁹

Summary of Potential Risks for Organisations Under MySpace

Potential Risks

- many of the risks to organisations using the MySpace website are similar to those risks under the YouTube Platform;
- breaches of third party confidentiality and privacy rights;
- breaches of third party copyright and intellectual property rights;
- liability for defamatory or offensive Content or third party Content postings and/or the removal or termination of postings and MySpace membership for contravention of the Prohibited Content provisions;
- breaching the TOU by carrying out “commercial endeavours” in relation to Content; and

¹⁴⁹ *Bragg v Linden Research Inc*, No 06-4925 (United States District Court for the Eastern District of Pennsylvania, 30 May 2007).

- breaching the TOU by posting Content which solicits personal information from persons under 18 years of age and inadvertently accepting postings from persons under 14 years of age.

Proposals for Risk Minimisation

- crosschecking of issues of confidentiality and privacy;
- systems for identifying and obtaining permissions to use third party copyright, intellectual property and to obtain consent to potential infringement of third party privacy rights;
- systems for screening out, monitoring and immediately removing infringing, defamatory or offensive Content or comments, combined with webspace policies of strict and discretionary removal;
- obtaining express approval from MySpace to promote any form of commercial service and to incorporate any promotion or advertising of ancillary services;
- including clear and prominent codes of conduct, terms of use or an indemnity clause on a MySpace page for third party Content posters, subject to issues of enforceability;
- obtaining express permission from MySpace for the inclusion of contact details and URLs,

given that this information is provided to persons under 18 years of age to facilitate the legitimate purposes of a government agency; and

- systems for screening out, monitoring and immediately removing Content postings from persons under the age of 14.

9 Specific Analysis – Second Life

Key Points

Regulating behaviour

There are six forms of behaviour that may result in a Platform Member being suspended from Second Life or having their account terminated. These are:

- intolerance;
- harassment;
- assault;
- disclosure;
- indecency; and
- disturbing the peace.

The prohibition on disclosure generally relates to privacy concerns. It includes a prohibition on remotely monitoring conversations, meaning that if an organisation wants to regulate the actions of Platform Users on their land they must do so in person by regularly interacting with participants within Second Life.

An organisation could potentially be liable for defamatory or offensive statements made by its Platform Users in Second Life, if the statements are encouraged or not promptly removed when discovered. As Second Life operates in real-time, an organisation may need to actively participate with Platform Users in the

organisation's Second Life space to monitor the activities of Platform Users in real-time and quickly respond to disruptive behaviour.

If an organisation is particularly risk adverse or plans to use Second Life primarily to host private meetings, the organisation's island can be turned into a 'private' space and participants who enter the space can be required to agree to a contractual TOU statement. If the space is to be open and public, it may be possible to place conspicuous notices at the points of entry to the virtual land informing Platform Users of the risks they may be exposed to generally in Second Life, and in particular, on the organisation's virtual land. A general disclaimer of liability for the actions of third persons, where applicable, could also help to limit the potential liability of the organisation.

The Platform Provider has the right to resolve disputes between Platform Members, but generally tries not to interfere. For any disputes between the Platform Provider and a Platform Member, the dispute must first be resolved by arbitration, and if this fails, under the laws of the State of California.

Copyright

Copyright will subsist in virtual objects made in Second Life where:

- *textures* (images that can be applied to the face of an object) are copyright artistic works;

- *builds* (a combination of primitive shapes and textures) are copyright artistic works; and
- *scripts* (programming language that is attached to objects to allow them to interact with the virtual environment) are copyright literary works.

Using someone else's texture or copying someone else's build will be a reproduction of that texture or build. Displaying the virtual object to the public will be a communication. If this reproduction or communication is done without the copyright owner's permission, it will be an infringement of copyright. Taking screenshots or videos within Second Life (usually to display outside the virtual environment) may also infringe copyright in any of the visual works.

Users of copyright material in Second Life, as in anywhere else, will have to take care not to infringe the author's moral rights, particularly the moral right of integrity (the right not to have their work treated in a derogatory manner).

In the absence of a defence to copyright infringement, Platform Members will need to obtain permission from copyright owners to use copyright work. Some copyright owners in Second Life have attached open content licences, such as Creative Commons Licences or GNU General Public Licences, to their work to make the process of obtaining permission simpler.

The creator of an object in Second Life may select restrictions applying to the use of that object, including 'no copy', 'no modify' and 'no transfer'. It is arguable that if a creator has chosen not to place these restrictions on the use of their object, there will be an implied licence to copy, modify or transfer the work. Care will need to be taken if an organisation or another Platform Member is attempting to rely on an implied licence, as the scope of the licence will not be clear (and is likely to be narrow).

An organisation may be secondarily liable for copyright infringement if they are held to be authorising infringement, for example by providing an open and unregulated sandbox where Platform Members are able to create their own builds and experiment with the environment. If the organisation is alerted to complaints from copyright owners, they should take prompt action to investigate and resolve the complaint in order to limit their liability for secondary infringement.

If an organisation or any other Platform Member wishes to make audio streams or audiovisual streams available in Second Life, they must ensure that they have explicit licences from the copyright owners of all the content featured in the streams and the broadcasters of each of the streams. In most cases, the licence a Platform Member may receive by purchasing a copy of a film or song will not extend to making that film or song available to other people. Any users of Second Life who play a stream on their virtual land without seeking an additional licence, or without using material that is either appropriately openly licensed or in the public domain, will infringe copyright in that stream.

An organisation should take care to ensure that all content that is used by that organisation or by participants on the organisation's virtual land is either original material or has been appropriately licensed from the copyright owner. The organisation can also appropriately licence any of its own material that is made available to Platform Members in Second Life.

Second Life

[9.1] **Differences:** Unlike the YouTube and MySpace websites, Second Life is different in that it is an immersive virtual environment. Because of the nature of user interaction in Second Life, there are some key differences in the legal issues concerning Second Life and the contractual terms of the Second Life TOU which are important to understand.

[9.2] **Linden Lab:** Linden Lab's position is that it is only the provider of a service which can be altered by Platform Members, not the controller of that service. It states under the TOU that it does not regulate the content of communications or interactions between Platform Members and in effect has little control over the quality, safety, morality or legality of the Second Life environment.¹⁵⁰ Examples of this position include:

- Linden Lab cannot and will not control whether or not minors or adults obtain access to designated "Teen Areas" or adult areas (See [9.7]); and
- Linden Lab is not a party to any contract or agreement entered into between Platform Members in the Second Life environment or in connection with Second Life for the provision of products, services or software.¹⁵¹

150 See Second Life 'Terms of Service: Clause 1.2'.

151 See Second Life 'Terms of Service: Clause 5.2'.

Issues For Consideration

The effect of these factors is that much of the interaction between Second Life Platform Members will be regulated and decided by those Platform Members. However, all Platform Members will still be bound by the provisions of the Second Life TOU where applicable.

Limitations on User Activities – Prohibited Behaviours

[9.3] **Community Standards:** Under clause 4.1 of the Second Life TOU, users of Second Life must abide by the “Community Standards” which are incorporated into the TOU. Generally, these are six forms of behaviour which can result in suspension or termination of a Platform Member’s account.¹⁵² These are:

- Intolerance – “Actions that marginalize, belittle, or defame individuals or groups or inhibit the satisfying exchange of ideas and diminish the Second Life community as whole”;
- Harassment – “[c]ommunicating or behaving in a manner which is offensively coarse, intimidating or threatening, constitutes unwelcome sexual advances or requests for sexual favors, or is otherwise likely to cause annoyance or alarm.” There is a further condition under the TOU that states that Platform Members agree that they will not “stalk”, abuse, attempt to abuse or harass other users;¹⁵³

152 See Second Life *Community Standards* (2007) <<http://secondlife.com/corporate/cs.php>> at 6 June 2007.

153 See Second Life ‘Terms of Service: Clause 4.1’.

- Assault – interfering with another Platform Member’s avatar “in a manner which prevents their enjoyment of Second Life”;
- Disclosure – sharing personal information about another Platform Member or remotely monitoring conversations is prohibited;
- Indecency – content, communication, or behaviour “which involves intense language or expletives, nudity or sexual content, the depiction of sex or violence, or anything else broadly offensive” must be contained within private land in areas rated “Mature”; and
- Disturbing the peace – disrupting scheduled events, spamming, or using objects which interfere with the Second Life servers or the enjoyment of Platform Members are all prohibited.

[9.4] **Discretion:** In addition to the Community Standards, Platform Members agree that they will not use or transmit any Content that Linden Lab may further determine in its sole discretion as being obscene or offensive.¹⁵⁴

[9.5] **Privacy:** Linden Lab utilises the personal information of Platform Members in accordance with its “Privacy Policy” and will not provide personal information to third parties unless they have first obtained the Platform Member’s written approval to do so.¹⁵⁵ However, Linden Lab does not guarantee the security of any of a Platform Member’s private transmission in Second Life (for example, transmission of private information to an

154 See Second Life ‘Terms of Service: Clause 4.1’.

155 See Second Life ‘Terms of Service: Clause 6.1’.

account or a Platform Member's conversations with other Platform Members) from unauthorized interception or access by third parties.¹⁵⁶

- [9.6] ***Monitoring Conversations and Interactions:*** The TOU under the Community Standards impose an outright prohibition on Platform Members who remotely monitor conversations between other Second Life Platform Members or who post or share conversation logs without the consent of those conversing Platform Members.¹⁵⁷ For example, a Platform Member is prohibited from creating a scripted object which records or retransmits the text of a conversation between avatars without their knowledge or consent.. However, Platform Members must also agree that Linden Lab reserves the right to track, record, observe and follow Platform Member interactions within the Second Life environment and that Linden Lab may share general or demographic information with third parties about its service, but this sharing will not be linked to a Platform Member's personal information without the Platform Member's consent.¹⁵⁸

- [9.7] ***Age Restrictions:*** The TOU provide that Platform Members must be of 13 years of age or older and that Platform Member between the age of 13 and 17 (minors) are only allowed to use the "Teen Grid"—a Second Life platform wholly separate from the "Main Grid". Adults are prohibited from accessing the Teen Grid. However, Linden Lab can only rely on each Platform Member's own representation regarding their true age. There are no technological processes or methods available in Second Life to screen out people under 13 years of age, or to ensure that minors and adults only enter their respective designated areas.

156 See Second Life 'Terms of Service: Clause 6.1'.

157 See Second Life 'Community Standards : Clause 4'.

158 See Second Life 'Terms of Service: Clause 6.2'.

Issues For Consideration

Organisations operating facilities in Second Life should be aware of the potential difficulties which may arise when dealing with other Platform Members. In order to effectively manage the space, and avoid or limit potential liability for the acts of Platform Members, organisations will need to regulate the behaviour of participants to ensure that such behaviour is in accordance with the Second Life Community Standards. They may also occasionally see fit to ban Platform Members from the organisation's virtual land. Organisations will have to establish systems for monitoring Platform Member behaviour and removing Platform Members whose behaviour is in breach of the Community Standards or which could reasonably be offensive to other Platform Members and to the general public.

In addition to being a difficult exercise in community management and public relations, this may result in legal difficulties if not properly managed. Platform Members may feel aggrieved if they are unreasonably removed and banned from an area. This feeling may be increased where land and services being provided are of a public nature. Platform Members may feel that a government organisation has a higher duty to provide a space for them to use and express themselves than a private entity does.

Linden Lab's right to monitor interactions is the only way it can track and take action against any breaches by Platform Members of the TOU. It also means that Linden

Lab can become aware of any breach of the TOU that occurs in the organisation's virtual space. Combined with Linden Lab's discretion to suspend or terminate accounts,¹⁵⁹ organisations should be careful to take all reasonable steps to monitor and enforce the TOU on Platform Members who visit the organisation's virtual land or island. Organisations should also refer all infringing behaviour within the virtual space to Linden Lab, who can take further action against the responsible Platform Members, particularly where an organisation is not able to prevent disrupting, offensive, or illegal behaviour.

Organisations must accept that as part of using Second Life, that any conversations or interactions whether between Platform Members or between Platform Members and the organisation that take place in the organisation's virtual space may be monitored or observed by other Platform Members. Organisations may wish to develop a policy regulating what subjects cannot be discussed within the organisation's virtual space by the organisation's employees, to lessen the risk of defamatory, confidential, offensive or embarrassing statements being made on the organisation's behalf. Organisations must also ensure that no confidential information is inadvertently revealed through use of Second Life and should establish systems for screening and cross-checking issues of confidentiality before they are permitted to be discussed within the Second Life environment.

159 See Second Life 'Terms of Service: Clause 2.6'.

The prohibition on remote monitoring means that if governments are to effectively regulate the actions of Platform Members on their virtual land, they must do so in person, that is, an employee or agent of an organisation will be required to regularly interact with visiting Platform Members to monitor and regulate their behaviour. In Chapter 10, this Report suggests that organisations take an active role in regulating their virtual lands, in order to limit liability for the actions of their users.

Linden Lab may remove or terminate an account for any reason¹⁶⁰, although it seems that to date most suspensions and terminations have occurred as the result of a Platform Member's direct breach of the TOU. However, if Linden Lab believes that an island in the main grid is particularly attracting Platform Members who are under 18 or allowing minors to participate in an area that also attracts adult Platform Members, then this may be an issue. An organisation may want to include within its virtual land a policy of strict and discretionary removal for any Platform Member suspected to be under 18 years of age and make it clear to Platform Members that the organisation will not be liable for any Platform Members entering the land who are under the permitted age.

In addition, an organisation may want to obtain express permission from Linden Lab to establish a designated and separate "Teen Area" within its land for use of the organisations services by minors only.

160 See Second Life 'Terms of Service: Clause 2.6'.

Financial Issues

- [9.8] **Currency:** The TOU state that the currency used in Second Life is not a real currency, that Linden Lab “has the absolute right to manage, regulate, control, modify and/or eliminate such Currency as it sees fit in its sole discretion” and that Linden Lab will have no liability to Platform Members in the event of its modification or elimination.¹⁶¹ This may be at odds both with the expectations of the users of Second Life, and with the views of government regulators.
- [9.9] **Account:** All Platform Members of Second Life must open a membership account with Linden Lab to use the Second Life environment and must provide accurate account information.¹⁶² Account names selected by Platform Members must themselves not breach the copyright or trademarks of any third party.¹⁶³

Issues For Consideration

For all intents and purposes, the Linden Dollar is freely convertible to and from US dollars. If organisations wish to participate in Second Life, they will inevitably have to spend some Linden Dollars in the Second Life environment. Organisations doing so should be aware that while the Linden Dollar appears to be freely convertible, they are regulated as tokens and not as a currency.

The fact that the Linden Dollar is not regulated as a currency carries the inherent risk that the money that

161 See Second Life 'Terms of Service: Clause 1.4'.

162 See Second Life 'Terms of Service: Clause 2.1'.

163 See Second Life 'Terms of Service: Clause 2.3'.

Platform Members deposit in Second Life may not be able to be withdrawn. While Linden Lab obviously has an interest in allowing currency to freely flow to and from Second Life, and has an interest in maintaining the integrity of its virtual economy, it has expressly disclaimed any liability in case the economy fails in an isolated or widespread manner.

Linden may change the rate of exchange between Linden dollars and US dollars or the general volume or price limitations set in relation to the Linden Dollar at any time through the Linden Lab controlled “LindeX” exchange rate.¹⁶⁴ This means that the value of any land or products purchased in Second Life are subject to Linden Lab’s powers to regulate the Second Life economy and the Linden Dollar. Organisations may decide to monitor the value of any purchased land in terms of its promotion of the organisation’s profile and services, rather than in any real monetary value.

Limitations on User Activities - Copyright

- [9.10] **Virtual Objects:** Second Life is a virtual environment which is largely based upon the creation of virtual objects. Each virtual object in the environment is likely to embody some copyright elements. As is discussed elsewhere in this Report, copyright will subsist in any original literary, artistic, dramatic, or musical work, as well as in films, sound recordings, broadcasts, and published editions. In Australia, the test for originality is quite low, and most objects which are not mere copies of other objects will fulfil the originality requirement. Many different types of copyright may subsist in any object in Second Life.

¹⁶⁴ Second Life ‘Terms of Service : Clauses 1.5’.

Copyright in Virtual Objects

- [9.11] ***Objects, Primitives and Textures:*** Objects in Second Life are created through a combination of geometric shapes. The interface provided allows Platform Members to make complex builds by combining primitive shapes (primitives) and applying textures to the faces of the object (textures). The textures are images sourced either from the library provided by Linden Lab, or are uploaded as images for a fee. Once external images are uploaded as textures, they can be freely shared by Platform Members just like any other object in the world. Each texture uploaded will generally be a copyright protected artistic work.
- [9.12] ***Builds:*** Builds themselves, being a combination of primitives and textures, will also be copyright protected artistic works. Reproduction of builds without permission will therefore usually infringe that copyright. Objects in Second Life can also have scripts attached to them which allow the object to interact with the environment. These scripts are written by builders in a simplified programming language, and will accordingly be copyright literary works.

Issues For Consideration

Provided that these objects can be said to originate from a person, and not be slavish imitations of other works without any originality of their own, all but the most trivial of builds, textures, and scripts will attract copyright protection.

There is no requirement that any of these types of objects be created by the same person. Any given build in Second Life could comprise a number of textures from a

number of different authors, scripts from other programmers, and primitives sourced from other builders. Copying or displaying a build without permission may, therefore, infringe copyright owned by any number of authors. Organisations should be careful to treat every object in Second Life as copyright protected work, whether created by the organisation for the purposes of its virtual land or island or introduced into its land or island by visiting Platform Users.

Infringement of Copyright in Virtual Objects

- [9.13] **Ownership:** The TOU states that each Platform Member retains copyright and other intellectual property rights in “Content” which each Platform Member creates in Second Life.¹⁶⁵ Content is defined as “anything created by users or by Linden Lab in the Second Life environment, including graphics, sound effects, music, video, audio, computer programs, animation text and other creative output.”¹⁶⁶ Under the TOU, Platform Members must acknowledge that each creator of Content (“Other Content Providers”) retains copyright in their own Content.¹⁶⁷ However, Platform Members do not own any data which may represent a Platform Member’s Content. Ownership in this data is retained by Linden Lab and this is necessary for Linden Lab to embody Platform Members’ Content in the Second Life environment.¹⁶⁸

165 See Second Life ‘Terms of Service: Clause 3.2’.

166 See Second Life ‘Terms of Service: Clause 1.3’.

167 See Second Life ‘Terms of Service: Clause 1.3’.

168 See Second Life ‘Terms of Service: Clause 3.3’.

- [9.14] ***Licence of Content to Second Life:*** Under the TOU, each Platform Member automatically grants to Second Life a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive right and licence to Second Life to use, reproduce and distribute each Platform Member's Content within the Second Life environment and for the purposes of promoting or marketing the Second Life service,¹⁶⁹ without limitation on commercial or non-commercial use.
- [9.15] ***Licence of Patent Rights in Content:*** Interestingly, the TOU require that Platform Members grant to Linden Lab and all other Platform Members a royalty-free, worldwide, fully paid-up, transferable perpetual, irrevocable, non-exclusive licence for any patent rights which a Platform Member obtains in respect of a Platform Member's Content.¹⁷⁰ Further, one cannot make any claims against Linden Lab or other Platform Member for any alleged infringement of patent rights in that Content.¹⁷¹
- [9.16] ***No Licence of Content to Other Users:*** Unlike YouTube, the Second Life TOU does not:
- require that each Platform Member grant a broad to other Platform Members a broad, non-exclusive licence to reuse their Content; nor
 - provide a system for the regulation and reuse of Content material between Platform Members.
- [9.17] ***Use of Content between Users:*** The TOU state that the rights of other Platform Members ("Content providers") are not licensed or transferred by mere use of the Second Life

169 See Second Life 'Terms of Service: Clause 3.2'.

170 See Second Life 'Terms of Service: Clause 3.2'.

171 Ibid.

service,¹⁷² and that use of the Linden software and the Second Life environment does not grant Platform Members rights of any kind with respect to services provided by Linden Lab or “to any Content”.¹⁷³ This means that issues of Content reuse and infringement between Platform Members are left to be decided between those Platform Members. The TOU reinforces this position by stating that Content providers are solely responsible for understanding their position in relation to their intellectual property rights in their Content.¹⁷⁴

[9.18] ***Use of Second Life by Non-Members:*** It is possible for persons who are not Platform Members of Second Life to participate in the Second Life environment through portals run by third parties. These portals are essentially alternative points of entry into the Second Life environment. Non-members can enter into Second Life through the “eyes” of the avatars of those third parties who control these portals. Consequently, these persons can enter Second Life without having agreed to the click wrap TOU through the standard Second Life membership procedure (however, the third party portal owner will always be a Second Life Platform Member who has agreed to the TOU).

[9.19] ***Application of the TOU to Non-Members:*** This raises the question whether infringing, offensive or other behaviour in breach of the TOU by these non-members can be controlled. There is no requirement in the TOU that obliges portal providers to ensure that these non-members comply with the TOU. However, Linden Lab can certainly enforce non-member breaches of the TOU against those third parties who allowed the non-members to use their avatars.

172 See Second Life ‘Terms of Service: Clause 1.3’.

173 See Second Life ‘Terms of Service: Clause 3.1’.

174 See Second Life ‘Terms of Service: Clause 3.2’.

- [9.20] ***Vicarious Liability:*** Organisations in Second Life may be potentially liable for authorising copyright infringement in a number of scenarios. If an organisation's employees infringe copyright in the objects that they create, or by reproducing in-world objects outside the environment without permission, then the organisation may be vicariously liable for the actions of its employees.
- [9.21] ***Other Users Infringement:*** More interestingly, and more difficult to police, organisations may be liable when third-party users, not their employees but other Platform Users, infringe copyright on or near the virtual land owned by the organisation. An organisation might be liable for transmitting Content that infringes or violates any third party rights under clause 4.1 of the TOU (because any one viewing the organisation's space will witness the occurrence of the infringement by that third party user).
- [9.22] ***Infringement of Build and Texture:*** Without express permission, any use of a texture by someone other than the copyright owner (being the Platform Member who created the texture) in a build will generally infringe copyright. Use of a texture on a surface will be a reproduction of the texture, and displaying the completed object to other people will be a communication of the texture. Similarly, copying someone else's build without permission will be a reproduction of the copyright in the build, and displaying the object to the public will be a communication of that build.
- [9.23] ***Building Rights:*** If the organisation provides an open sandbox, for example, to allow its Platform Users to create their own builds and experiment with the environment, it may open itself up to liability if the Platform Users use that sandbox to infringe copyright. This can happen even unintentionally if the organisation is not careful which rights it allows Platform Users

of its lands to have. If the organisation allows Platform Users to have building rights, it is important that the organisation exercise some supervision over the objects that are built there.

Issues For Consideration

All Platform Members retain copyright and other intellectual property rights in the Content they create in Second Life, but do not retain the data in that Content.

Organisations should note that the general provisions of the TOU state that Platform Members cannot assign or transfer “any or all of their rights hereunder” without the prior consent of Linden Lab. This restriction on transfer and assignment of rights should not apply to Platform Members’ copyright in Content. However, this might not prevent Linden Lab from arguing that this restriction contractually applies to “all” Platform Members’ rights (including copyright) under the TOU, if they have an interest in a particular transfer or in an attempt to force agreement on another issue. Organisations should be aware of this risk.

Despite retaining ownership of their Content, Platform Members grant a broad licence to Linden Lab to reuse their Content within the Second Life environment and for the purposes of promoting or marketing the services provided by Second Life. Like YouTube, Platform Members will not be paid any remuneration for that reuse by Linden Lab. Platform Members can terminate this licence at any time, however if Linden Lab is currently

using Content for a commercial purpose, it is not obliged to stop using it until that purpose has been fulfilled.¹⁷⁵

Organisations will have to consider whether or not any proposed Content that is patent protected or may be capable of patent protection should be submitted into the Second Life environment. This is because under the user patent licence, non-patented rights in Content will be lost through exposure to other Platform Members and Linden Lab and patented rights in Content can be copied and used by other Platform Members and Linden Lab. Organisations should establish a system for identifying any patent protected or patentable material that may be included in submitted Content and a risks analysis for determining whether or not that material will be included.

Organisations will need to have obtained all licences and consents to use all intellectual property rights and privacy rights which may be contained in material used in their submitted Content. Organisations will need to have a system in place for comprehensively identifying and obtaining such permissions before Content is submitted. Further, organisations will have to ensure that employees of the organisation do not copy or reproduce other users Content in Second Life without first obtaining permission or a licence from that user to reuse that Content.

In relation to portal introduced non-members who infringe or cause offensive behaviour in an organisation's virtual space, despite the uncertainty over the application of the

175 See Second Life 'Terms of Service: Clause 3.2'.

TOU, organisations should extend their prohibitions on infringing or offensive behaviour to both Second Life members and non-members. Again, the organisation should notify Linden Lab of any infringing behaviour, so that Linden Lab can deal directly with the third party portal providers.

If organisations are alerted to complaints from copyright owners, they should take prompt action to investigate the complaint in order to limit their liability for secondary infringement.

Organisations must establish systems for removing Content brought into their virtual land by other Platform Members which infringes the copyright, intellectual property rights or other rights of third parties and notifying Linden Lab of that infringement. The risk of such Content being brought into the organisations virtual space may be reduced by building a sign at the entrance to the organisations virtual space which clearly prohibits the introduction of any content which infringes copyright, intellectual property rights or other rights of third parties. Organisations should also take advantage of the automatic return system in Second Life, which will remove objects placed by visitors on the land after a certain period.

If it is clear that third party copyright owner's rights are being infringed, organisations can take certain steps to remove the infringing material. It is possible in Second Life to force the return of any object placed on land on which an organisation has ownership rights. This has the

effect of removing the object from the land and returning it to the inventory of the person who created it.

It is also possible to ban people from entering the land; if a particular Platform Member is found to repeatedly infringe on intellectual property rights owned by third parties after warning, it may be appropriate to restrict that Platform Member from entering onto the land.

This restriction will generally have the effect of removing that Platform Member's actions from the reach of government control. Without the right and ability to monitor and prevent a person's actions, an organisation may not be vicariously liable for that person's infringement. An organisation may wish to obtain legal advice in this regard.

An organisation may still be liable for authorising or contributory infringement for unauthorised copying which does not occur on its land, but this will be hard to prove, unless it is possible to show that the organisation encouraged other Platform Members to infringe the copyrights of third-parties.

Infringement by Reproducing Outside of the Environment

- [9.24] **Copyright in Outside Objects:** In addition to infringing copyright in virtual objects by copying and exhibiting them in world, copyright can also be infringed by reproducing virtual objects outside of Second Life. Under TOU clause 4.1, Platform Members must agree that they will not do anything, including uploading or transmitting Content, that infringes or

violates any third party rights, which would include third party copyright and other intellectual property rights.¹⁷⁶ Taking a screenshot or recording a video within Second Life will often infringe copyright in any of the visible works, unless permission is granted or an exception applies. Because of the sheer volume of copyright material in Second Life, if there is no licence or clear defence, taking screenshots or recording videos will often be very risky, as doing so will potentially infringe copyright in the many different works which embody the visible builds.

Issues For Consideration

If an organisation plans to record images or videos of the virtual environment, it should ensure either that (a) it owns the copyright in all the visible builds or has permission to reproduce them; or (b) its use is likely to fall within one of the defences to copyright infringement.

Organisations must establish systems for removing objects that are reproductions of objects outside of Second Life which are brought into their virtual land by other Platform Members which infringe the copyright, intellectual property rights or other rights of third parties and notifying Linden Lab of that infringement. Again a clear prohibition against the introduction of such objects without the permission of the copyright or intellectual property rights holder, at the entrance to the organisation's virtual space may reduce this risk.

¹⁷⁶ See Second Life 'Terms of Service: Clause 4.1'.

Defences to Infringement

- [9.25] **Uncertainty:** The application of defences to copyright infringement in Second Life is still relatively uncertain. In late 2006, Ailin Graef, a prominent Second Life entrepreneur, was holding a question and answer session for CNET, when her avatar, Anshe Chung, was attacked by griefers who unleashed a torrent of flying representations of penises on the stage. Graef was forced to abandon the session, but members of the audience were able to take screenshots and capture videos of the incident. Anshe Chung Studios lodged complaints under the US *Digital Millenium Copyright Act*, and asked YouTube to remove the videos on the basis that they reproduced copyright in the Anshe Chung avatar. A Sydney Morning Herald journalist was among those who had images and videos subject to notice and takedown complaints under the US DMCA.¹⁷⁷ YouTube removed the videos subject to the complaint, before they were informed by the Electronic Frontier Foundation that the videos were likely to be fair uses of copyright material under US copyright law. Some of the videos were subsequently restored, and Anshe Chung Studios has admitted that the DMCA complaint was a mistake.

Issues For Consideration

While such videos may be fair use under the broader US standard, it is doubtful whether they would constitute fair dealing in Australia. In Australia, the videos would either have to have been taken for the purpose of reporting the

¹⁷⁷ Stephen Hutcheon, *Anshe's kinky past revealed* (2007) The Sydney Morning Herald <<http://www.smh.com.au/articles/2007/01/17/1168709794333.html>> at 6 June 2007.

news, or for creating a parody or satire of Anshe Chung. It is uncertain whether this incident would be considered 'newsworthy' enough to fit within the first defence, and the exact limits of the new defence of parody and satire are as yet unknown.

Moral Rights

- [9.26] **Moral Rights:** Many of the uses of copyright material in Second Life may infringe the moral rights of the authors, even if they do not infringe the economic rights of the copyright owner. It is not uncommon in Second Life to see famous images or representations used in unauthorised advertising for virtual goods, or copyright works which are altered or put in different contexts in the virtual environment. Many of the authors of these works may have valid claims under the moral right of integrity.

Issues For Consideration

Users of copyright material in Second Life, just as anywhere else, will have to take care not to use that material in a derogatory manner.

- [9.27] **Notification of Moral Rights:** Organisations must establish systems for removing Content which breaches the moral rights of third parties which are brought into their virtual land by other Platform Members. This will require a notification procedure to accommodate persons alleging that their moral rights have been breached by Content within the organisation's virtual space. Again a clear prohibition against introducing Content

that infringes moral rights at the entrance to the organisation's virtual space may reduce this risk.

Implied Licensing and 'Flags'

[9.28] **Implied Permission:** If no defence to copyright infringement exists, someone who reproduces an object, build, or script within or outside Second Life will need permission from the copyright owner, or face liability for copyright infringement. This permission, however, need not be given explicitly, and may, in some cases, be implied from the circumstances.

[9.29] **Flag Restrictions:** In Second Life, the creator of an object, or the uploader of a texture, may select the restrictions that will apply to other (downstream) users of that object or texture. These restrictions attach to the object and trigger when another user attempts to reuse or copy the object. These include:

- no copy – other Platform Members may not make a digital copy of the object;
- no modify – if other Platform Members receive a copy of the object, they may not make changes to it; and
- no transfer – if a Platform Members receives a copy of the object, they may not give it or a copy of it to other Platform Members.

[9.30] These restrictions, called 'flags', instruct the client software that it may not deal with the object in ways that are not explicitly allowed.

Issues For Consideration

Flags can be used to provide a technological restriction on the ability of Platform Members to infringe copyright. It is important to note, however, that the inverse may also be true. It is arguable that if these flags are not set, the owner of the object may be giving permission to copy, modify, or transfer the object to any other Platform Members who happen to come across the object.

Because copyright licences can be much more sophisticated than simple mechanical restrictions on the ability to copy, modify, or transfer a work, the extent of any implied licence must be questioned. The scope of the implied licence will depend on the particular circumstances, and the general practice of Second Life residents. It is unclear, for example, whether unchecking the “no copy” and “no transfer” restriction boxes is the equivalent of granting a broad permission for any other Platform Members to sell copies of the work, or whether unchecking the “no modify” checkbox equates to allowing the modification of the work for use in advertising materials. It will also be difficult to say whether such actions would be taken to waive the moral rights in the work.

For additional certainty, if an organisation is providing content to Platform Members with any of the flags unchecked, it should also provide additional information specifying what the Platform Member can and cannot do with that content. If this information has been properly communicated, it will form the basis of explicit Content copyright licences between the organisation and Platform Members.

Explicit Copyright Licences

- [9.31] **Express Permission:** Creators of objects in Second Life have the ability to provide explicit licences which will govern how their content may legally be used. As discussed in this Report, copyright owners may give permission to individuals, or to the world at large, which can be conditioned upon any number of restrictions that the copyright owner requires. The process of seeking and granting permission for every individual use is a tedious one, and some copyright owners find it much easier to provide blanket licences or “open content licences” which give any potential user certain rights and impose certain restrictions.
- [9.32] **Open Content Licensing:** Copyright owners in Second Life can use the easily recognisable Creative Commons licences (see [10.15]) to let all other Platform Members know exactly what they may and may not do with their work. Copyright owners can also use custom made copyright licences, or other standard open access licences. Many of the scripts, for example, that are found in Second Life are licensed under one of the various free software licences, usually the GNU General Public Licence (GPL).¹⁷⁸
- [9.33] **Government Organisations:** It is sometimes desirable for government organisations to provide copyright licences to allow their citizens to reproduce and adapt government owned works. This is certainly true in Second Life, where governments have the ability to encourage Platform Members to participate in creating and interacting within the public space. While it is certainly possible to have a static information-dispensary presence in Second Life, to do so would invariably and immediately limit the potential that the environment provides for interactivity.

178 <<http://www.gnu.org/copyleft/gpl.html>>

Issues For Consideration

The incorporation of open content licences into the Second Life system stands to provide an important tool for managing copyright within the virtual world. In some cases, Platform Members who create builds in Second Life may not wish to prevent other Platform Members from copying and adapting those builds. The use of open content licences allows Platform Members to provide explicit legal permission to all other Platform Members to copy and adapt their builds, but conditioned on certain requirements. The Platform Member is able to impose minimum standards for the sharing of his or her Content. Anyone seeking to use the Content for other purposes must contact the Platform Member for another licence to do so.

At the moment, only a small percentage of works in Second Life use open content licences. Most Content does not allow copying or modification (because it has been created either for the Platform Member's private use or for sale), or allow free copying and redistribution without restriction. Linden Lab is, however, working to implement more subtle copyright control mechanisms, whereby Platform Members can specify the particular licence that they wish to apply to their work. At present, Platform Members can license their work under an open access licence, but they must do so manually by attaching the licence to the work. Proposed interface improvements will allow Platform Members to attach such a licence in the building interface.

If government organisations want to allow Platform Members in Second Life to have some level of interactivity with government created objects, copyright policies will have to be considered. Any copying, reproduction, or communication (transmission or display) of an object without permission will therefore generally be an infringement of copyright. The decision of how to let Platform Members interact with government created works is accordingly a copyright management question.

Organisations should decide whether or not they will seek to absolutely protect their copyright and intellectual property rights in their Content or if they will agree to permit reuse of their Content through open content licensing. If an organisation chooses open content licensing, it will need risk analysis systems for evaluating and categorising which Content can be open licensed in Second Life and which Content may not and ensuring that open content licenses are attached to the correct Content.

Copyright in Audio and Audiovisual Streams

- [9.34] **Streaming:** Second Life also supports the streaming of audio and audiovisual material into the environment. Under clause 3.4 of the TOU, Linden Lab permits Platform Members to use texture and environment content it has created to design facilities to watch moving media within Second Life (for example, creating a virtual cinema room that screens real world

movies).¹⁷⁹ Owners of parcels of land may configure the land so that each person whose avatar is on the parcel will hear an audio stream, or replace a particular texture with an audiovideo stream, such that every object on the parcel with that texture becomes a projection surface for the video. None of the streaming content interacts directly with the Linden Lab servers—neither videos nor audio materials are technically copied or rebroadcast from Second Life. Rather, the servers instruct the client software, running on each Platform Member's computer, to play a publicly accessible stream. The URL for this stream can be set by the owner of the land or other designated users. The person hosting the stream is ultimately responsible for the content of the stream, but there is no requirement that the owner of the land has any relationship to the person hosting the stream. In many cases, owners of land in Second Life will host their streams on their own private or leased servers, but this will not always be the case.

- [9.35] ***Infringement by Broadcasting:*** Many copyright streams in Second Life infringe the copyright in the films or sound recordings they broadcast. This will be true whether the original film or sound recording has been legitimately licensed or not. This happens most often when a Platform Member makes a copy of a copyright film or sound recording, or downloads a film or song for personal use, and makes that available via a streaming server. In almost all cases, the licence a Platform Member may receive by purchasing a copy of a film or song will not extend to making that film or song available to other people. Any Platform Members of Second Life who play a stream on their virtual land without seeking an additional

179 See Second Life 'Terms of Service: Clause 3.4'.

licence, or without using material that is either appropriately openly licensed or in the public domain, will infringe copyright in that stream.

[9.36] ***Infringement through Stream Linking:*** In other cases, owners of land in Second Life will link to a stream provided by another party. These links are provided transparently to the Platform Members, whose clients will usually connect to the streams automatically. For example, upon entering an organisation's virtual land, Platform Members will automatically see and hear any linked media streams. Without extra permissions, this will probably also be considered a communication of (a) the copyright material contained within the stream; and (b) the copyright in the broadcast itself. Once again, generally speaking, the licence that podcasters and videocasters provide for Platform Members to stream their content will not extend to making that content available to third parties.

[9.37] ***Infringement by Viewing:*** In most cases, Platform Members will not be liable for copyright infringement merely due to the technical copies which are made as part of the process of listening or watching a stream.¹⁸⁰ However, if the making of the stream is an infringement itself (ie, if the contents of the stream are infringing copies), then listening or watching that stream will also be an infringement.¹⁸¹ Because the Platform Member will generally have no easy way to determine whether any given stream has been properly licensed or not, he or she may be an innocent infringer and may not be liable for damages. However, Platform Members should be aware that in

180 See *Copyright Act 1968* (Cth) ss 43A(1), 111A(1).

181 See *Copyright Act 1968* (Cth) ss 43A(2), 111A(2).

many cases they would be expected to be able to differentiate between legitimate licensed copyright material and infringing material.

Issues For Consideration

If organisations or any other Platform Members wish to make streams available in Second Life, they must ensure that they have explicit licences from the copyright owners of all the content featured in the streams and the broadcasters of each of the streams.

Where the owner of virtual land in Second Life merely provides a link to a stream which is not under his or her control, he or she may not be liable for any infringement by reproducing the content of the stream. However, the landowner may still infringe copyright if he or she is considered to be communicating the stream to the public. This would also be a breach of clause 4.1 of the TOU.

It is safest, in all the circumstances, for an organisation to ensure that it has permission to link to a stream and that the contents of the stream are non-infringing.

Copyright in broadcasts can also be infringed by Platform Members recording their in-game experience using video capture software. There is little that a land owner in Second Life can do to prevent unauthorised recordings of broadcasts in this manner, but it may be desirable for organisations to warn Platform Members of the circumstances in which such recording will infringe copyright in the broadcasts and underlying copyright records or films.

Organisations should also consider seeking assurances from Platform Members that they will indemnify the government from secondary liability claims for copyright infringement (see [10.11]).

Liability for Defamation and Offensive Statements

[9.38] **Defamatory and Offensive Statements:** As with the other services, Government Organisations could potentially be liable for statements made by Platform Members within Second Life. Statements which are defamatory or offensive could expose organisations to liability if they are encouraged or not promptly removed when discovered. Such statements will also generally breach clause 4.1 of the TOU.

[9.39] **Not Limited to Verbal Statements:** Unlike the other Platforms, however, statements of these kinds can be made not only by Platform Members' textual chat, but also by clothing that avatars are wearing, objects in the possession of the avatar, or by objects which are placed upon the land (including billboards and signs) by the Platform Members.

Issues For Consideration

Because participation in Second Life is in real-time, offensive or defamatory statements may be much more difficult to police in Second Life than in the other Platforms. On the other hand, such statements are also more transitory, and are less likely to be communicated to people not present at the time they were made. Accordingly, while the ability to monitor will be reduced, potential damage may also be reduced.

The increased difficulties in monitoring Platform Members' speech and content will make it necessary for organisations to adopt different methods of review. A more active participation by organisations may be required in order to monitor the actions of Platform Members in real-time, and be able to quickly respond to disruptive behaviour (keeping in mind that the TOU prohibits remote monitoring—see [9.6]).

Importantly, any claim against an organisation or the actions of another Platform Member where that Platform Member is not located on virtual land owned by the organisation, and is not acting either on behalf of the organisation or on recommendation by the organisation, is likely to fail.

Indemnities, Liabilities, Modification and Dispute Resolution

- [9.40] ***Second Life Not Liable:*** Under the TOU, Platform Members agree that Linden Lab will not be liable to Platform Members or any third party for damages arising out of use of the Second Life Platform or the TOU,¹⁸² and attempts to limit any such damages to the sum of \$US50.00. Linden Lab provides the Second Life environment to Platform Members on a “AS IS” basis and does not provide any warranty to Platform Members that Second Life will meet any particular purpose.¹⁸³

182 See Second Life 'Terms of Service: Clause 5.5'.

183 See Second Life 'Terms of Service: Clause 5.4' (although some jurisdictions do not allow certain implied warranties to be excluded).

- [9.41] **Right to Change and Modify:** Linden Lab has the right under the TOU to interrupt, change or eliminate any aspect of the Second Life environment for any reason or to suspend or terminate a Platform Member's account without any liability to Platform Members and without being liable for any failure to perform.¹⁸⁴ Linden Lab can also change the TOU in its sole discretion by posting any amendments on to its website or by otherwise communicating changes to its Platform Members.¹⁸⁵ Please note the recent US decision on these issues (see [4.9]).¹⁸⁶
- [9.42] **Right to Delete:** All data, including data supporting user Content, can be deleted by Linden Lab at any time and for any reason, regardless of the Platform Members copyright or other rights in that Content and Linden Lab does not guarantee the preservation of any value in any deleted data (such as any value in deleted virtual land).¹⁸⁷
- [9.43] **Right to Resolve Disputes:** Linden Lab generally tries not to interfere in disputes between Platform Members. It reserves the right, but not the obligation, to resolve disputes, and disclaims responsibility for arrangements between Platform Members and other persons.¹⁸⁸ Further, Platform Members release Linden Lab from any claims they may have against Linden Lab in relation to any claims or damages that a Platform Member may have against another Platform Member.¹⁸⁹

184 Second Life 'Terms of Service: Clause 1.6, 2.6'.

185 Second Life 'Terms of Service' Introductory paragraph.

186 *Joe Douglas v United States District Court for the Central Court Of California and Talk America Inc.* USCA No. 06-75424 (9th Cir. July 18 2007).

187 See Second Life 'Terms of Service: Clause 5.3'.

188 Second Life 'Terms of Service: Clauses 5.1 and 5.2'.

189 See Second Life 'Terms of Service: Clause 5.1'.

- [9.44] ***Indemnifying Linden Lab:*** Like the YouTube TOU, Second Life Platform Members agree to indemnify and hold harmless Linden Lab, its officers and employees from all damages and claims arising out of a Platform Member's breach of the TOU or from a Platform Member's use of the Second Life Platform. This includes any claim by third parties against Linden Lab that the Platform Member's Content or Second Life activities infringed that third party's copyright, intellectual property or other proprietary rights.
- [9.45] ***Jurisdiction:*** In case of a dispute between Linden Lab and one of its Platform Members, the Second Life TOU specifically provides that it is to be "finally settled" under the Rules of Arbitration of the International Chamber of Commerce in San Francisco, California. However, this does not prevent a Platform Member from applying to a court of "competent jurisdiction" for injunctive relief.¹⁹⁰

Issues For Consideration

Organisations must bear the risk of any inconvenience or damage that they might incur as the result of using Second Life, including, but not limited to, Linden Lab's right to change or delete any aspect of the Second Life environment. To date, it seems that most cases of deletion have occurred because of Platform Members' breaches of the TOU.

Second Life prefers to provide Platform Members with tools to manage their own affairs. For example,

190 "General Conditions"; But note that this term may be struck out or unenforceable in certain jurisdictions; see Dale Clapperton & Stephen Corones, 'Unfair Terms in "Clickwrap" and Other Electronic Contracts' (2007) 35 *Australian Business Law Review* 152.

landowners have the ability to exclude other Platform Members, and Platform Members have the ability to ignore other Platform Members. Beyond violation of the Community Standards or TOU, Linden Lab is unlikely to become involved in disputes between Platform Members. This would include any disputes that Platform Members may have with a government organisation. In addition, Linden Lab's ability to resolve Platform Member disputes does not override a Platform Member's right to take legal action against another Platform Member in the real world.¹⁹¹

Organisations must acknowledge that Linden Lab has the right to recover any damages that may have been awarded against Linden Lab from the organisation's breach of the TOU or use of the services of Second Life, including third party claims of infringement of copyright, intellectual property or other proprietary rights, even if there is no fault on the organisation's behalf.

Contesting any disputes may not be financially prohibitive if an organisation could argue that a court of "competent jurisdiction" for injunctive relief would be the appropriate forum. In any event, the no liability provisions would reduce an organisation's chances of successfully disputing a matter.

191 See Second Life 'Terms of Service: Clause 5.1'.

Summary of Potential Risks for Parties Under Second Life

Potential Risks

- the behaviour of Platform Members within an organisation's virtual space;
- infringement by other Platform Members of copyright and other intellectual; property rights in the organisation's Content by other Platform Members;
- avoiding the infringement of copyright and other intellectual property rights in the objects and Content created by other Platform Members;
- secondary infringement of the copyright, moral rights, other intellectual property rights and privacy rights of third parties in Content brought into the organisation's virtual space by other Platform Members;
- defamatory or offensive statements being inadvertently made by the organisation or by other Platform Members in the organisation's virtual space;
- underage persons visiting the organisation's virtual space;
- the nature of Linden Dollars and factors which may affect their real-world value;

- assigning or transferring rights in Content;
- giving up patent rights in Content under the TOU patent licence;
- the risks (uncertainty and insecurity) of relaying on implied licenses to reuse Content, as opposed to the certainty and security afforded by express, open content licences for reuse of Content; and
- liability for copyright infringement through audio and audiovisual streams.

Proposals for Risk Minimisation

In addition to the suggestions put forward under each “Issues for Consideration” box in this chapter, organisations should consider policies to manage copyright infringement and the imposition of enforceable contractual terms of use.

Copyright law is complex and its application in the virtual environment of Second Life is even more so. However, provided that organisations are careful about how they deal with copyright material, the risk can be safely managed. There are a number of important points that any organisation providing services within Second Life should be aware of, including:

- ensuring that all content used in creating new builds is either original material for which the organisation owns copyright or that an appropriate licence for its use in this context has been obtained from the copyright owner;

- ensuring that the organisation has permission to rebroadcast any audio or audiovisual streams used on the organisation's virtual land;
- ensuring that Platform Members who have rights to build on the land are aware of copyright restrictions and enforcing a policy of removing any infringing material which is reported or located; and
- ensuring that an appropriate licence is given to all Platform Members who are encouraged to copy and build upon organisation created works.

To the extent that it is practical, organisations should ensure that Platform Members and potential Platform Members or Platform Users are aware of what is expected of them, and what restrictions will be placed upon their behaviour by organisations in Second Life.

A contractual TOU statement may be able to be incorporated into an organisation's Second Life space, requiring deemed assent from Platform Members before they are able to proceed further. It would be possible, for instance, to require such an agreement from any Platform Members participating in private meetings or spaces hosted on an organisation's virtual land. Such measures are likely, however, to prove prohibitively difficult to implement in "public spaces", as there are multiple points of entry to lands in Second Life.

Nevertheless, where an organisation is particularly risk adverse or the risk is expected to outweigh any negative publicity associated with only operating a closed space,

then a formal application process could be instituted for all of an organisation's virtual spaces. In this case, the organisation would allow entry to the island only to Platform Members who agree to the TOU, essentially turning the entire island into a 'private' virtual space.¹⁹²

Imposing additional terms upon Platform Members can easily be done if the organisation plans to use Second Life primarily as a medium in which to host private consultancy meetings. For example, an organisation may choose to require invited participants to enter into valid agreements which govern their behaviour and limit the organisation's liability before they can enter the private virtual space. Of course, if the organisation is only using Second Life for private meetings, the risk to which it is likely to be exposed will be significantly lower, as will the usefulness of the space as a publicity or information venue.

Attempting to use contractual TOU without barring entry to the virtual land would be difficult, as Platform Members would not necessarily have to agree to the terms before entering. As with the browse-wrap licences discussed at [4.3] – [4.5], in many cases this would mean that there would not be a valid contract.

This can, to a large extent, be overcome by placing conspicuous notices explaining or referring to the TOU on the virtual land and any external places where Platform

192 It should be noted that instituting such strict controls over its webspace is likely to increase the risk of the government being found to be vicariously liable for the actions of third parties within that space.

Members are encouraged to enter the virtual land (for example, websites and advertisements). If the terms are conspicuous enough that the Platform Members entering and remaining in the virtual space could be reasonably expected to have read them, they may be effective to prevent claims which may arise from the exercise of the organisation's power over those in the organisation's virtual space.

Any such, the TOU should also inform Platform Members of the risks which they may be exposed to in Second Life, and in particular, in the organisation's virtual space. They should be aware that they are entering a real-time simultaneous virtual world where there is little restriction on the actions of participants. As a result, they should be aware that they may be exposed to the offensive speech of other Platform Members which the organisation has little ability to prevent at the time it occurs. A general disclaimer of liability for the actions of third persons, where applicable, could go a long way to limiting, but not altogether eliminating, the potential liability of organisation in Second Life.

10 Steps to Reduce Risks Arising From Platform Use

- [10.1] Organisations that establish webspaces in the Platforms can take a range of steps to minimise the legal risks arising from use of the Platforms discussed in this Report. These steps include the following:

Policies and Procedures

- [10.2] ***Clearly define appropriate and inappropriate behaviours:*** The key to the avoidance or reduction of risks arising from use of the Platforms is to adopt and implement policies and procedures for use of an organisation's webspaces which clearly define the kinds of behaviours by Platform Users (whether employees or third parties) that are appropriate and inappropriate. If these policies are stated clearly and enforced, an organisation should be able to substantially reduce its potential liability for the actions of its employees and other parties who use its webspaces.
- [10.3] ***No approval of illegal activities:*** Organisations need to take care not to expressly or impliedly recommend or suggest that Platform Users engage in activities on the organisation's webspaces that may be illegal or infringe another party's rights. If Platform Users engage in unlawful activity within an organisation's webspace, the organisation should distance itself from that activity and, to the extent practicable, exercise control over the Platform Users. For example, if a Platform User is found to be defrauding or harassing other Platform Users on an organisation's virtual property in a webspace, the organisation should respond appropriately, including, where necessary, by excluding the Platform User from the organisation's virtual property.

Monitoring

- [10.4] Organisations may consider it advisable to implement regular monitoring of their webspaces and virtual spaces, to ensure that they are able to quickly and efficiently detect and react to inappropriate behaviour by Platform Users and inappropriate material posted by Platform Users. This will assist the organisation to avoid allegations of negligence or wilful blindness in relation to legal actions that may arise from the behaviour of Platform Users.
- [10.5] It is important to be aware that by choosing to monitor behaviour an organisation may also expose itself to greater liability for the actions of Platform Users, particularly where it has publicly stated that it will undertake such monitoring. This is because it will have essentially ‘taken’ responsibility for these actions. For this reason, the Platform Providers specifically state in their TOU agreements that they will not actively monitor material posted on their services, and instead rely on Platform Users to bring inappropriate material to their attention. This kind of statement has been relied on extensively by YouTube to limit its liability in copyright infringement litigation brought against it by prominent film and television studios (currently before the courts).¹⁹³
- [10.6] However, courts are less likely to look favourably upon an argument that a lack of monitoring absolves responsibility in relation to a limited webspace such as a MySpace page or Second Life island, where monitoring can be more practically implemented. It will be better for an organisation—both in terms of its legal position and its public image—to take all reasonable steps in relation to monitoring online behaviour in its webspaces, instead of doing nothing.

193 *Viacom International Inc v YouTube Inc and Google Inc*, (United States District Court for the Southern District of New York, filed 13 March 2007).

- [10.7] If an organisation does choose to monitor its webspaces, monitoring will be easier in MySpace and Second Life than in YouTube. Responsibility for monitoring behaviour and content should be given to someone who is familiar with and experienced in reviewing online publications or websites and who is competent to make a determination about whether behaviour or content is appropriate or inappropriate.

Modification or Removal of Inappropriate Material

- [10.8] The most effective step an organisation can take to guard against legal liability is to promptly modify or remove any illegal or inappropriate material posted on its webpace as soon as the organisation becomes aware of it. As the manager of the webpace, an organisation will usually have the right and ability to modify or remove material at its discretion without notifying the person who has posted it. As well as clearly defining the kinds of materials that the organisation regards as being inappropriate on its webspaces (see [10.2]), the organisation's policies and procedures should describe the circumstances when material that has been posted to a webpace will be modified or removed and the procedures that will be followed.
- [10.9] ***“Notice and takedown” procedure for copyright infringing material:*** Organisations may wish to implement a “notice and takedown” procedure for material that allegedly infringes copyright, similar to the procedures followed by the Platform Providers (see further at [5.15]-[5.19]). The legal safe harbours associated with these procedures are designed to protect Platform Providers and will not apply to an organisation as a mere proprietor of a webpace on a Platform (see [6.7]). Nevertheless, by adopting its own “notice and takedown” procedure, an organisation may reduce its liability for copyright

infringement, as taking reasonable steps to prevent infringement, including compliance with standard industry practice, is a factor that will be taken into account by Australian courts in determining whether a party has infringed copyright by authorising infringing acts.¹⁹⁴ Furthermore, removing material in a timely manner limits the harm done to the copyright owner, which in turn limits the damages that may be recoverable if infringement is established.

[10.10] The steps an organisation should take to implement a “notice and takedown” procedure include:

- nominating a copyright officer to receive notices under the procedure;
- implementing a procedure whereby material is removed promptly on receipt of a notification of infringement (similar to that described at [5.17]-[5.18]); and
- establishing a policy for the removal or exclusion of repeat infringers from the web space.

Imposition of Additional Terms of Use or Codes of Conduct

[10.11] An organisation may seek to limit its liability for the actions of third parties by including its own (additional) terms of use, codes of conduct or indemnity clauses on its web spaces. Such an approach will generally not be practical in the case of the YouTube Platform because there is no obvious location on that Platform within the control of an organisation where such terms could be published. However, organisations could impose

194 *Copyright Act 1968* (Cth) s 36(1A)(c).

additional terms of use on their MySpace webspaces, for example, by including a statement providing guidance on acceptable conduct in close proximity to the comments section of the organisation's MySpace page. Similarly, in Second Life an indemnities statement could be displayed to Platform Users as they enter a public webospace or they could be required to act in accordance with a code of conduct before they are permitted to access a private webospace.

Managing an Online Community and Exercising the Discretion to Exclude Platform Users

- [10.12] The terms of use imposed by an organisation on Platform Users who use its webspaces should clearly state that the organisation has the discretion to exclude any Platform Users who do not comply with its acceptable use policy or a specified code of conduct. However, it is also important that the interests of Platform Users—members of the Platform's online community—are considered when an organisation exercises its power to regulate use of its webspaces. Platform Users should only be excluded as a last resort, and the process for exclusion should, as far as possible, be transparent and reviewable.

Actively Managing Government Copyright in the Public Interest

- [10.13] Government organisations that establish webspaces on Platforms need to give careful consideration to whether, and how, they make Government-owned copyright material available to Platform Users. The most risk-averse stance for Government bodies is to refuse permission to all Platform Users to copy or re-use Government copyright works. While this may be a safe option, it is not a realistic one in webspaces

established by Government organisations as it would prevent Platform Users from interacting with and re-using a broad range of Government materials that have been produced at public expense. There is increasing support for the view that providing broad usage rights for Government copyright material is of social, economic and cultural benefit to the State.¹⁹⁵

- [10.14] **Open Content Licensing:** A simple solution for making Government-owned copyright material available in webspaces established by Government organisations is to use open content licensing. Open content licensing enables copyright owners to give a broad permission in advance for members of the public to perform certain acts with their copyright works on certain conditions. Open content licences provide an excellent opportunity for Government organisations to provide a certain level of access to Platform Users while minimising administrative overheads. By adopting an appropriate standard-form licence, Government organisations can inform Platform Users about the uses of Government copyright material that are—or are not—permitted, without having to address the question of user rights on an individual basis. The Queensland Spatial Information Council has recently released a Government Information Licensing Framework report in which it considers that open content licensing may be suitable for use in relation to the vast majority of government copyright material.¹⁹⁶

195 See, in particular, Chapter 4 – Copyright, in B Fitzgerald, A Fitzgerald, G Middleton, Y Lim and T Beale, *Internet and E-Commerce Law: Technology, Law and Policy*, Lawbook/Thomson, 2007 at [4.310] to [4.320]. See also, Peter N. Weiss, *Borders in Cyberspace: Conflicting Public Sector Information Policies and their Economic Impacts* (2002), US Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service
http://www.weather.gov/sp/Borders_report.pdf at 11 April 2007.

196 *Government Information and Open Content Licensing: An Access and Use Strategy*, Queensland Spatial Information Council (2007)
<<http://www.qsic.qld.gov.au/QSIC/QSIC.nsf/CPByUNID/BFDC06236FADB6814A25727>

[10.15] **Creative Commons:** Currently the most popular and commonly used open content licences are the Creative Commons suite of licences. The Creative Commons licences are standard form permissions which allow a copyright owner to give permission for people to copy and redistribute their work, as long as the users give proper attribution and respect a number of restrictions. The copyright owner can select which optional restrictions will apply to each work from a set of three standard restrictions:

- Non-Commercial: the user may use the work, but not in a commercial context; and
- Share-Alike: if the user modifies the work, he or she must make those modifications available under the same licence; or
- No-Derivatives: the user may share and redistribute the work, but may not make any changes to it.

[10.16] Governments and Platform Users both have much to gain from the certainty which can be provided by an up-front open content licence. Users who wish to deal with the copyright material in a way not covered by the licence (for example, commercial use) can always approach the copyright owner directly for another licence (and, if desired, Government organisations may charge a licensing fee for that use).

11 Conclusion

- [11.1] The current generation of internet platforms have the potential to provide significant benefits to organisations that wish to interact with their audience—whether customers or constituents—in a more direct and immediate fashion than has been possible with established communication channels.
- [11.2] The three Platforms considered in this Report—YouTube, MySpace and Second Life—represent a partial cross-section of the major new forms of online communication. By providing free-form social networking facilities which allow participants to interact in a range of ways the Platforms offer unique methods for organisations to reach their audience.
- [11.3] Organisations wishing to make use of these Platforms must be aware of the legal risks which may arise from their use and take steps to ensure that those risks are actively managed and minimised. In particular, any organisation using the Platforms must develop and implement policies and procedures addressing issues such as:
- behaviour and conduct of Platform participants and the organisation's employees;
 - the dissemination of illegal or inappropriate material;
 - copyright infringement; and
 - management of the organisation's own intellectual property.
- [11.4] Provided the legal risks are understood and properly managed, Platforms such as YouTube, MySpace and Second Life can be used both to improve the quality of engagement between Government organisations and members of the community and

expand the range of individuals with whom Government organisations communicate. The ability to reach an increasingly technically advanced younger generation is dependent on an ability to appreciate the different platforms for communication which are continuously emerging. Organisations that ignore these new platforms do so at the risk of failing to reach a steadily growing sector of society.

12 APPENDIX A

YouTube Terms of Use as at 23 July 2007

1. Your Acceptance

A. By using and/or visiting this website (collectively, including all Content available through the YouTube.com domain name, the "YouTube Website", or "Website"), you signify your agreement to (1) these terms and conditions (the "Terms of Service"), (2) YouTube's privacy notice, found at <http://www.youtube.com/t/privacy> and incorporated here by reference, and (3) YouTube's Community Guidelines, found at http://www.youtube.com/t/community_guidelines and also incorporated here by reference. If you do not agree to any of these terms, the YouTube privacy notice, or the Community Guidelines, please do not use the YouTube Website.

B. Although we may attempt to notify you when major changes are made to these Terms of Service, you should periodically review the most up-to-date version <http://www.youtube.com/t/terms>). YouTube may, in its sole discretion, modify or revise these Terms of Service and policies at any time, and you agree to be bound by such modifications or revisions. Nothing in this Agreement shall be deemed to confer any third-party rights or benefits.

2. YouTube Website

A. These Terms of Service apply to all users of the YouTube Website, including users who are also contributors of video content, information, and other materials or services on the Website. The YouTube Website includes all aspects of YouTube, including but not limited to YouTube channels and the YouTube "Embeddable Player."

B. The YouTube Website may contain links to third party websites that are not owned or controlled by YouTube. YouTube has no control over, and assumes no responsibility for, the content, privacy policies, or practices of any third party websites. In addition, YouTube will not and cannot censor or edit the content of any third-party site. By using the Website, you expressly relieve YouTube from any and all liability arising from your use of any third-party website.

C. Accordingly, we encourage you to be aware when you leave the YouTube Website and to read the terms and conditions and privacy policy of each other website that you visit.

3. YouTube Accounts

A. In order to access some features of the Website, you will have to create a YouTube account. You may never use another's account without permission. When creating your account, you must provide accurate and complete information. You are solely responsible for the activity that occurs on your account, and you must keep your account password secure. You must notify YouTube immediately of any breach of security or unauthorized use of your account.

B. Although YouTube will not be liable for your losses caused by any unauthorized use of your account, you may be liable for the losses of YouTube or others due to such unauthorized use.

4. General Use of the Website -- Permissions and Restrictions

YouTube hereby grants you permission to access and use the Website as set forth in these Terms of Service, provided that:

A. You agree not to distribute in any medium any part of the Website, including but not limited to User Submissions (defined below), without YouTube's prior written authorization.

B. You agree not to alter or modify any part of the Website, including but not limited to YouTube's Embeddable Player or any of its related technologies.

C. You agree not to access User Submissions (defined below) or YouTube Content through any technology or means other than the video playback pages of the Website itself, the YouTube Embeddable Player, or other explicitly authorized means YouTube may designate.

D. You agree not to use the Website, including the YouTube Embeddable Player for any commercial use, without the prior written authorization of YouTube. Prohibited commercial uses include any of the following actions taken without YouTube's express approval:

- sale of access to the Website or its related services (such as the Embeddable Player) on another website;
- use of the Website or its related services (such as the Embeddable Player), for the primary purpose of gaining advertising or subscription revenue;
- the sale of advertising, on the YouTube website or any third-party website, targeted to the content of specific User Submissions or YouTube content;
- and any use of the Website or its related services (such as the Embeddable player) that YouTube finds, in its sole discretion, to use YouTube's resources or User Submissions with the effect of competing with or displacing the market for YouTube, YouTube content, or its User Submissions. (For more information about prohibited commercial uses, [see our FAQ.](#))

E. Prohibited commercial uses do not include:

- uploading an original video to YouTube, or maintaining an original channel on Youtube, to promote your business or artistic enterprise;
- using the Embeddable Player to show YouTube videos on an ad-enabled blog or website, provided the primary purpose of using the Embeddable Player is not to gain advertising revenue or compete with YouTube;
- any use that YouTube expressly authorizes in writing.

(For more information about what constitutes a prohibited commercial use, [see our FAQ.](#))

F. If you use the YouTube Embeddable Player on your website, you must include a prominent link back to the YouTube website on the pages containing the Embeddable Player and you may not modify, build upon, or block any portion of the Embeddable Player in any way.

G. You agree not to use or launch any automated system, including without limitation, "robots," "spiders," or "offline readers," that accesses the Website in a manner that sends more request messages to the YouTube servers in a given period of time than a human can reasonably produce in the same period by using a conventional on-line web browser. Notwithstanding the foregoing, YouTube grants the operators of public search engines permission to use spiders to copy materials from the site for the sole purpose of and solely to the extent necessary for creating publicly available searchable indices of the materials, but not caches or archives of such materials. YouTube reserves the right to revoke these exceptions either generally or in specific cases. You agree not to collect or harvest any personally identifiable information, including account names, from the Website, nor to use the communication systems provided by the Website (e.g. comments, email) for any commercial solicitation purposes. You agree not to solicit, for commercial purposes, any users of the Website with respect to their User Submissions.

H. You will otherwise comply with the terms and conditions of these Terms of Service, YouTube Community Guidelines, and all applicable local, national, and international laws and regulations.

I. YouTube reserves the right to discontinue any aspect of the YouTube Website at any time.

5. Your Use of Content on the Site

In addition to the general restrictions above, the following restrictions and conditions apply specifically to your use of content on the YouTube Website.

A. The content on the YouTube Website, except all User Submissions (as defined below), including without limitation, the text, software, scripts, graphics, photos, sounds, music, videos, interactive features and the like

("Content") and the trademarks, service marks and logos contained therein ("Marks"), are owned by or licensed to YouTube, subject to copyright and other intellectual property rights under the law. Content on the Website is provided to you AS IS for your information and personal use only and may not be downloaded, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, or otherwise exploited for any other purposes whatsoever without the prior written consent of the respective owners. YouTube reserves all rights not expressly granted in and to the Website and the Content.

B. You may access User Submissions solely:

- for your information and personal use;
- as intended through the normal functionality of the YouTube Service;
- and
- for Streaming.

"Streaming" means a contemporaneous digital transmission of an audiovisual work via the Internet from the YouTube Service to a user's device in such a manner that the data is intended for real-time viewing and not intended to be copied, stored, permanently downloaded, or redistributed by the user. Accessing User Videos for any purpose or in any manner other than Streaming is expressly prohibited. User Videos are made available "as is."

C. User Comments are made available to you for your information and personal use solely as intended through the normal functionality of the YouTube Service. User Comments are made available "as is", and may not be used, copied, reproduced, distributed, transmitted, broadcast, displayed, sold, licensed, downloaded, or otherwise exploited in any manner not intended by the normal functionality of the YouTube Service or otherwise as prohibited under this Agreement.

D. You may access YouTube Content, User Submissions and other content only as permitted under this Agreement. YouTube reserves all rights not expressly granted in and to the YouTube Content and the YouTube Service.

E. You agree to not engage in the use, copying, or distribution of any of the Content other than expressly permitted herein, including any use, copying, or distribution of User Submissions of third parties obtained through the Website for any commercial purposes.

F. You agree not to circumvent, disable or otherwise interfere with security-related features of the YouTube Website or features that prevent or restrict use or copying of any Content or enforce limitations on use of the YouTube Website or the Content therein.

G. You understand that when using the YouTube Website, you will be exposed to User Submissions from a variety of sources, and that YouTube is not responsible for the accuracy, usefulness, safety, or intellectual property

rights of or relating to such User Submissions. You further understand and acknowledge that you may be exposed to User Submissions that are inaccurate, offensive, indecent, or objectionable, and you agree to waive, and hereby do waive, any legal or equitable rights or remedies you have or may have against YouTube with respect thereto, and agree to indemnify and hold YouTube, its Owners/Operators, affiliates, and/or licensors, harmless to the fullest extent allowed by law regarding all matters related to your use of the site.

6. Your User Submissions and Conduct

A. As a YouTube account holder you may submit video content ("User Videos") and textual content ("User Comments"). User Videos and User Comments are collectively referred to as "User Submissions." You understand that whether or not such User Submissions are published, YouTube does not guarantee any confidentiality with respect to any User Submissions.

B. You shall be solely responsible for your own User Submissions and the consequences of posting or publishing them. In connection with User Submissions, you affirm, represent, and/or warrant that: you own or have the necessary licenses, rights, consents, and permissions to use and authorize YouTube to use all patent, trademark, trade secret, copyright or other proprietary rights in and to any and all User Submissions to enable inclusion and use of the User Submissions in the manner contemplated by the Website and these Terms of Service.

C. For clarity, you retain all of your ownership rights in your User Submissions. However, by submitting User Submissions to YouTube, you hereby grant YouTube a worldwide, non-exclusive, royalty-free, sublicenseable and transferable license to use, reproduce, distribute, prepare derivative works of, display, and perform the User Submissions in connection with the YouTube Website and YouTube's (and its successors' and affiliates') business, including without limitation for promoting and redistributing part or all of the YouTube Website (and derivative works thereof) in any media formats and through any media channels. You also hereby grant each user of the YouTube Website a non-exclusive license to access your User Submissions through the Website, and to use, reproduce, distribute, display and perform such User Submissions as permitted through the functionality of the Website and under these Terms of Service. The above licenses granted by you in User Videos terminate within a commercially reasonable time after you remove or delete your User Videos from the YouTube Service. You understand and agree, however, that YouTube may retain, but not display, distribute, or perform, server copies of User Submissions that have been removed or deleted. The above licenses granted by you in User Comments are perpetual and irrevocable.

D. In connection with User Submissions, you further agree that you will not submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights,

unless you are the owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein.

E. You agree that your conduct on the site will comport with the YouTube Community Guidelines, found at http://www.youtube.com/t/community_guidelines, which may be updated from time to time.

F. YouTube does not endorse any User Submission or any opinion, recommendation, or advice expressed therein, and YouTube expressly disclaims any and all liability in connection with User Submissions. YouTube does not permit copyright infringing activities and infringement of intellectual property rights on its Website, and YouTube will remove all Content and User Submissions if properly notified that such Content or User Submission infringes on another's intellectual property rights. YouTube reserves the right to remove Content and User Submissions without prior notice.

7. Account Termination Policy

A. YouTube will terminate a User's access to its Website if, under appropriate circumstances, they are determined to be a repeat infringer.

B. YouTube reserves the right to decide whether Content or a User Submission is appropriate and complies with these Terms of Service for violations other than copyright infringement and violations of intellectual property law, such as, but not limited to, pornography, obscene or defamatory material, or excessive length. YouTube may remove such User Submissions and/or terminate a User's access for uploading such material in violation of these Terms of Service at any time, without prior notice and at its sole discretion.

8. Digital Millenium Copyright Act

A. If you are a copyright owner or an agent thereof and believe that any User Submission or other content infringes upon your copyrights, you may submit a notification pursuant to the Digital Millennium Copyright Act ("DMCA") by providing our Copyright Agent with the following information in writing (see 17 U.S.C 512(c)(3) for further detail):

- A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;
- Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site;
- Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled and information reasonably sufficient to permit the service provider to locate the material;

- Information reasonably sufficient to permit the service provider to contact you, such as an address, telephone number, and, if available, an electronic mail;
- A statement that you have a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and
- A statement that the information in the notification is accurate, and under penalty of perjury, that you are authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

YouTube's designated Copyright Agent to receive notifications of claimed infringement is: Heather Gillette, 1000 Cherry Ave., Second Floor, San Bruno, CA 94066, email: copyright@youtube.com, fax: 650-872-8513. For clarity, only DMCA notices should go to the Copyright Agent; any other feedback, comments, requests for technical support, and other communications should be directed to YouTube customer service through <http://www.google.com/support/youtube>. You acknowledge that if you fail to comply with all of the requirements of this Section 5(D), your DMCA notice may not be valid.

B. Counter-Notice. If you believe that your User Submission that was removed (or to which access was disabled) is not infringing, or that you have the authorization from the copyright owner, the copyright owner's agent, or pursuant to the law, to post and use the content in your User Submission, you may send a counter-notice containing the following information to the Copyright Agent:

- Your physical or electronic signature;
- Identification of the content that has been removed or to which access has been disabled and the location at which the content appeared before it was removed or disabled;
- A statement that you have a good faith belief that the content was removed or disabled as a result of mistake or a misidentification of the content; and
- Your name, address, telephone number, and e-mail address, a statement that you consent to the jurisdiction of the federal court in San Francisco, California, and a statement that you will accept service of process from the person who provided notification of the alleged infringement.

If a counter-notice is received by the Copyright Agent, YouTube may send a copy of the counter-notice to the original complaining party informing that person that it may replace the removed content or cease disabling it in 10 business days. Unless the copyright owner files an action seeking a court order against the content provider, member or user, the removed content may be replaced, or access to it restored, in 10 to 14 business days or more after receipt of the counter-notice, at YouTube's sole discretion.

9. Warranty Disclaimer

YOU AGREE THAT YOUR USE OF THE YOUTUBE WEBSITE SHALL BE AT YOUR SOLE RISK. TO THE FULLEST EXTENT PERMITTED BY LAW, YOUTUBE, ITS OFFICERS, DIRECTORS, EMPLOYEES, AND AGENTS DISCLAIM ALL WARRANTIES, EXPRESS OR IMPLIED, IN CONNECTION WITH THE WEBSITE AND YOUR USE THEREOF. YOUTUBE MAKES NO WARRANTIES OR REPRESENTATIONS ABOUT THE ACCURACY OR COMPLETENESS OF THIS SITE'S CONTENT OR THE CONTENT OF ANY SITES LINKED TO THIS SITE AND ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT, (II) PERSONAL INJURY OR PROPERTY DAMAGE, OF ANY NATURE WHATSOEVER, RESULTING FROM YOUR ACCESS TO AND USE OF OUR WEBSITE, (III) ANY UNAUTHORIZED ACCESS TO OR USE OF OUR SECURE SERVERS AND/OR ANY AND ALL PERSONAL INFORMATION AND/OR FINANCIAL INFORMATION STORED THEREIN, (IV) ANY INTERRUPTION OR CESSATION OF TRANSMISSION TO OR FROM OUR WEBSITE, (IV) ANY BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE WHICH MAY BE TRANSMITTED TO OR THROUGH OUR WEBSITE BY ANY THIRD PARTY, AND/OR (V) ANY ERRORS OR OMISSIONS IN ANY CONTENT OR FOR ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE YOUTUBE WEBSITE. YOUTUBE DOES NOT WARRANT, ENDORSE, GUARANTEE, OR ASSUME RESPONSIBILITY FOR ANY PRODUCT OR SERVICE ADVERTISED OR OFFERED BY A THIRD PARTY THROUGH THE YOUTUBE WEBSITE OR ANY HYPERLINKED WEBSITE OR FEATURED IN ANY BANNER OR OTHER ADVERTISING, AND YOUTUBE WILL NOT BE A PARTY TO OR IN ANY WAY BE RESPONSIBLE FOR MONITORING ANY TRANSACTION BETWEEN YOU AND THIRD-PARTY PROVIDERS OF PRODUCTS OR SERVICES. AS WITH THE PURCHASE OF A PRODUCT OR SERVICE THROUGH ANY MEDIUM OR IN ANY ENVIRONMENT, YOU SHOULD USE YOUR BEST JUDGMENT AND EXERCISE CAUTION WHERE APPROPRIATE.

10. Limitation of Liability

IN NO EVENT SHALL YOUTUBE, ITS OFFICERS, DIRECTORS, EMPLOYEES, OR AGENTS, BE LIABLE TO YOU FOR ANY DIRECT, INDIRECT, INCIDENTAL, SPECIAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES WHATSOEVER RESULTING FROM ANY (I) ERRORS, MISTAKES, OR INACCURACIES OF CONTENT, (II) PERSONAL INJURY OR PROPERTY DAMAGE, OF ANY NATURE WHATSOEVER, RESULTING FROM YOUR ACCESS TO AND USE OF OUR WEBSITE, (III) ANY UNAUTHORIZED ACCESS TO OR USE OF OUR SECURE SERVERS AND/OR ANY AND ALL PERSONAL INFORMATION AND/OR FINANCIAL INFORMATION STORED THEREIN, (IV) ANY INTERRUPTION OR CESSATION OF TRANSMISSION TO OR FROM OUR WEBSITE, (IV) ANY BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE, WHICH MAY BE TRANSMITTED TO OR THROUGH OUR WEBSITE BY ANY THIRD PARTY, AND/OR (V) ANY ERRORS OR OMISSIONS IN ANY CONTENT OR FOR

ANY LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF YOUR USE OF ANY CONTENT POSTED, EMAILED, TRANSMITTED, OR OTHERWISE MADE AVAILABLE VIA THE YOUTUBE WEBSITE, WHETHER BASED ON WARRANTY, CONTRACT, TORT, OR ANY OTHER LEGAL THEORY, AND WHETHER OR NOT THE COMPANY IS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. THE FOREGOING LIMITATION OF LIABILITY SHALL APPLY TO THE FULLEST EXTENT PERMITTED BY LAW IN THE APPLICABLE JURISDICTION.

YOU SPECIFICALLY ACKNOWLEDGE THAT YOUTUBE SHALL NOT BE LIABLE FOR USER SUBMISSIONS OR THE DEFAMATORY, OFFENSIVE, OR ILLEGAL CONDUCT OF ANY THIRD PARTY AND THAT THE RISK OF HARM OR DAMAGE FROM THE FOREGOING RESTS ENTIRELY WITH YOU.

The Website is controlled and offered by YouTube from its facilities in the United States of America. YouTube makes no representations that the YouTube Website is appropriate or available for use in other locations. Those who access or use the YouTube Website from other jurisdictions do so at their own volition and are responsible for compliance with local law.

11. Indemnity

You agree to defend, indemnify and hold harmless YouTube, its parent corporation, officers, directors, employees and agents, from and against any and all claims, damages, obligations, losses, liabilities, costs or debt, and expenses (including but not limited to attorney's fees) arising from: (i) your use of and access to the YouTube Website; (ii) your violation of any term of these Terms of Service; (iii) your violation of any third party right, including without limitation any copyright, property, or privacy right; or (iv) any claim that one of your User Submissions caused damage to a third party. This defense and indemnification obligation will survive these Terms of Service and your use of the YouTube Website.

12. Ability to Accept Terms of Service

You affirm that you are either more than 18 years of age, or an emancipated minor, or possess legal parental or guardian consent, and are fully able and competent to enter into the terms, conditions, obligations, affirmations, representations, and warranties set forth in these Terms of Service, and to abide by and comply with these Terms of Service. In any case, you affirm that you are over the age of 13, as the YouTube Website is not intended for children under 13. If you are under 13 years of age, then please do not use the YouTube Website here are lots of other great web sites for you. Talk to your parents about what sites are appropriate for you.

13. Assignment

These Terms of Service, and any rights and licenses granted hereunder, may

not be transferred or assigned by you, but may be assigned by YouTube without restriction.

14. General

You agree that: (i) the YouTube Website shall be deemed solely based in California; and (ii) the YouTube Website shall be deemed a passive website that does not give rise to personal jurisdiction over YouTube, either specific or general, in jurisdictions other than California. These Terms of Service shall be governed by the internal substantive laws of the State of California, without respect to its conflict of laws principles. Any claim or dispute between you and YouTube that arises in whole or in part from the YouTube Website shall be decided exclusively by a court of competent jurisdiction located in San Mateo County, California. These Terms of Service, together with the Privacy Notice at <http://www.youtube.com/t/privacy> and any other legal notices published by YouTube on the Website, shall constitute the entire agreement between you and YouTube concerning the YouTube Website. If any provision of these Terms of Service is deemed invalid by a court of competent jurisdiction, the invalidity of such provision shall not affect the validity of the remaining provisions of these Terms of Service, which shall remain in full force and effect. No waiver of any term of this these Terms of Service shall be deemed a further or continuing waiver of such term or any other term, and YouTube's failure to assert any right or provision under these Terms of Service shall not constitute a waiver of such right or provision. YouTube reserves the right to amend these Terms of Service at any time and without notice, and it is your responsibility to review these Terms of Service for any changes. Your use of the YouTube Website following any amendment of these Terms of Service will signify your assent to and acceptance of its revised terms. YOU AND YOUTUBE AGREE THAT ANY CAUSE OF ACTION ARISING OUT OF OR RELATED TO THE YOUTUBE WEBSITE MUST COMMENCE WITHIN ONE (1) YEAR AFTER THE CAUSE OF ACTION ACCRUES. OTHERWISE, SUCH CAUSE OF ACTION IS PERMANENTLY BARRED.

YouTube Privacy Notice as at 23 July 2007

Updated as of June 19, 2007

The [Google Privacy Policy](#) describes how Google and its subsidiaries treat personal information when you use Google services, including information provided when you use YouTube. In addition, the following describes privacy practices specific to YouTube. To understand how we treat the information you give us as you use YouTube, you should read this policy and the Google Privacy Policy.

Personal Information

- **Non-Account Activity.** You can watch videos on YouTube without having a YouTube Account or a Google Account.
- **Account-Related Activity.** Certain other activities on YouTube—like uploading videos, posting comments, or watching restricted videos—require you to have a YouTube Account or a Google Account. We ask for some personal information when you create a YouTube Account or a Google Account, including your email address and a password, which is used to protect your account from unauthorized access. A Google Account allows you to access many of our services that require registration.
- **Usage Information.** We may record information about your usage, such as when you use YouTube, the channels, groups, and favorites you subscribe to, the contacts you communicate with, and the frequency and size of data transfers, as well as information you display or click on in YouTube (including UI elements, settings, and other information). If you are logged in, we may associate that information with your account. We may use clear GIFs (a.k.a. "Web Beacons") in HTML-based emails sent to our users to track which emails are opened by recipients.
- **Content Uploaded to Site.** Any personal information or video content that you voluntarily disclose online (on discussion boards, in messages and chat areas, within your playback or profile pages, etc.) becomes publicly available and can be collected and used by others.

Uses

- If you submit personally identifiable information to us through the YouTube Sites, we use your personal information to operate, maintain, and provide to you the features and functionality of the YouTube Sites, as well as provide special personalized features to you.
- Your account name (not your email address) is displayed to other Users when you upload videos or send messages through the YouTube Sites and other Users can contact you through messages and comments. Any videos that you submit to the YouTube Sites may

be redistributed through the internet and other media channels, and may be viewed by the general public.

- We do not use your email address or other personally identifiable information to send commercial or marketing messages without your consent or except as part of a specific program or feature for which you will have the ability to opt-in or opt-out. We may, however, use your email address without further consent for non-marketing or administrative purposes (such as notifying you of major YouTube Site changes or for customer service purposes).
- We use both your personally identifiable information and certain non-personally-identifiable information (such as anonymous User usage data, cookies, IP addresses, browser type, clickstream data, etc.) to improve the quality and design of the YouTube Sites and to create new features, promotions, functionality, and services by storing, tracking, and analyzing User preferences and trends.
- We use cookies, clear gifs, and log file information to: (a) store information so that you will not have to re-enter it during your visit or the next time you visit the YouTube Sites; (b) provide custom, personalized content and information; (c) monitor the effectiveness of our marketing campaigns; (d) monitor aggregate metrics such as total number of visitors, pages viewed, etc.; and (e) track your entries, submissions, and status in promotions, sweepstakes, and contests.

Your Choices

- You may, of course, decline to submit personally identifiable information through the YouTube Sites, in which case you can still view videos and explore the YouTube Sites, but YouTube may not be able to provide certain services to you. Some advanced YouTube features may, for authentication purposes, require you to sign up for other Google services like Google Checkout or AdSense. The privacy notices of those services govern the use of your personal information associated with them.
- You may update or correct your personal profile information and email preferences at any time by visiting your [account profile page](#).

More Information

Google adheres to the US Safe Harbor privacy principles. For more information about the Safe Harbor framework or our registration, see the [Department of Commerce's web site](#).

For more information about our privacy practices, go to [Google's full privacy policy](#). If you have additional questions, please [contact us any time](#). Or write to us at:

YouTube Privacy
1000 Cherry Ave.
San Bruno CA 94066

or

Privacy Matters
c/o Google Inc.
1600 Amphitheatre Parkway
Mountain View, CA 94043 (USA)

YouTube Community Guidelines as at 23 July 2007.

Respect the YouTube Community

We're not asking for the kind of respect reserved for nuns, the elderly, and brain surgeons. We mean don't abuse the site. Every cool new community feature on YouTube involves a certain level of trust. We trust you to be responsible, and millions of users respect that trust, so please be one of them.

We Review Videos Flagged As Inappropriate

Okay, this one is more about us than you. When a video gets flagged as inappropriate, we review the video to determine whether it violates our Terms of Use—flagged videos are not automatically taken down by the system. If we remove your video after reviewing it, you can assume that we removed it purposefully, and you should take our warning notification seriously. Take a deep breath, read our [Terms of Use](#) and try to see it from our perspective. If you find other videos on YouTube with the same violations, please flag them so we can review them as well!

Don't Cross the Line

Here are some common-sense rules that will help you steer clear of trouble:

- YouTube is not for **pornography** or **sexually explicit content**. If this describes your video, even if it's a video of yourself, don't post it on YouTube. Also, be advised that we work closely with law enforcement and we report child exploitation. Please read our [Safety Tips](#) and stay safe on YouTube.
- Don't post videos showing **dangerous or illegal acts**, like animal abuse, drug abuse, or bomb making.
- Graphic or gratuitous **violence** is not allowed. If your video shows someone getting hurt, attacked, or humiliated, don't post it.
- YouTube is **not a shock site**. Don't post gross-out videos of accidents, dead bodies and stuff like that. This includes war footage if it's intended to shock or disgust.
- Respect **copyright**. Only upload videos that you made or that you have obtained the rights to use. This means don't upload videos you didn't make, or use content in your videos that someone else owns the copyright to, such as music tracks, snippets of copyrighted programs, or videos made by other users, without their permission. Read our [Copyright Tips](#) for more information.
- We encourage free speech and defend everyone's right to express unpopular points of view. But we don't permit **hate speech** which contains **slurs** or the **malicious use of stereotypes** intended to attack

or demean a particular gender, sexual orientation, race, religion, or nationality.

- There is zero tolerance for **predatory behavior, stalking, threats, harassment, invading privacy**, or the revealing of other members' **personal information**. Anyone caught doing these things may be permanently banned from YouTube.
- Don't try to cheat the system. No gamed thumbnails, spamming tags, or creating dummy accounts that do things a human wouldn't do.

Please take these rules seriously and take them to heart. Don't try to look for loopholes or try to lawyer your way around them—just understand them and try to respect the spirit in which they were created. Violations of the Terms of Use may result in a warning notification or may result in termination of your account and deletion of all your videos. We decide whether we believe your violation of our Terms of Use should result in termination of your account. **If you have an account terminated you are prohibited from ever signing up for another account!**

YouTube is for the Community

Remember that this is your community! Each and every user of YouTube makes the site what it is, so don't be afraid to dig in and get involved!

- **Have fun with the site.** There's a lot here to see, and lots of folks making amazing stuff—one of them might be you! Equipment's getting cheaper and easier to use all the time, so dive in and enjoy.
- **Let folks know what you think.** Feedback's part of the experience, and when done with respect, can be a great way to make friends, share stories, and make your time on YouTube richer. So leave comments, rate videos, make your own responses to videos that affect you, enter contests of interest—there's a lot going on and a lot of ways to participate here.
- **You may not like everything you see.** Some of the content here may offend you—if you find that it violates our Terms of Use, then click "Flag as Inappropriate" under the video you're watching to submit it for review by YouTube staff. If it doesn't, then consider just clicking on something else—why waste time watching videos you don't like?

That's it! Thanks for reading!

—The YouTube Team

What kinds of commercial uses of the YouTube website are prohibited, and which aren't?

We've recently updated our Terms of Service to clarify what kinds of uses of the website and the YouTube Embeddable Player are permitted. We don't want to discourage you from putting the occasional YouTube video in your

blog to comment on it or show your readers a video you like, even if you have general purpose ads somewhere on your blog. We will, however, enforce our Terms of Service against, say, a website that does nothing more than aggregate a bunch of embedded YouTube videos and intentionally tries to generate ad revenue from them.

13 APPENDIX B

Terms of Use Agreement - MySpace.com as at 23 July 2007

Version : April 11, 2007

MySpace.com is a social networking service that allows Members to create unique personal profiles online in order to find and communicate with old and new friends. The services offered by MySpace.com ("Myspace.com" or "we") include the MySpace.com website (the "MySpace Website"), the MySpace.com Internet messaging service, and any other features, content, or applications offered from time to time by MySpace.com in connection with the MySpace Website (collectively, the "MySpace Services"). The MySpace Services are hosted in the U.S.

This Terms of Use Agreement ("Agreement") sets forth the legally binding terms for your use of the MySpace Services. By using the MySpace Services, you agree to be bound by this Agreement, whether you are a "Visitor" (which means that you simply browse the MySpace Website) or you are a "Member" (which means that you have registered with Myspace.com). The term "User" refers to a Visitor or a Member. You are only authorized to use the MySpace Services (regardless of whether your access or use is intended) if you agree to abide by all applicable laws and to this Agreement. Please read this Agreement carefully and save it. If you do not agree with it, you should leave the MySpace Website and discontinue use of the MySpace Services immediately. If you wish to become a Member, communicate with other Members and make use of the MySpace Services, you must read this Agreement and indicate your acceptance during the Registration process.

This Agreement includes MySpace.com's policy for acceptable use of the MySpace Services and Content posted on the MySpace Website, your rights, obligations and restrictions regarding your use of the MySpace Services and MySpace.com's Privacy Policy. In order to participate in certain MySpace Services, you may be notified that you are required to download software or content and/or agree to additional terms and conditions. Unless otherwise provided by the additional terms and conditions applicable to the MySpace Services in which you choose to participate, those additional terms are hereby incorporated into this Agreement. You may receive a copy of this Agreement by emailing us at: privacy@MySpace.com, Subject: Terms of Use Agreement.

MySpace.com may modify this Agreement from time to time and such modification shall be effective upon posting by MySpace.com on the MySpace Website. You agree to be bound to any changes to this Agreement when you use the MySpace Services after any such modification is posted. It is therefore important that you review this Agreement regularly to ensure you

are updated as to any changes.

Please choose carefully the information you post on MySpace.com and that you provide to other Users. Your MySpace.com profile may not include the following items: telephone numbers, street addresses, last names, and any photographs containing nudity, or obscene, lewd, excessively violent, harassing, sexually explicit or otherwise objectionable subject matter. Despite this prohibition, information provided by other MySpace.com Members (for instance, in their Profile) may contain inaccurate, inappropriate, offensive or sexually explicit material, products or services, and MySpace.com assumes no responsibility or liability for this material. If you become aware of misuse of the MySpace Services by any person, please contact [MySpace](#) or click on the "Report Inappropriate Content" link at the bottom of any MySpace.com page.

MySpace.com reserves the right, in its sole discretion, to reject, refuse to post or remove any posting (including private messages) by you, or to restrict, suspend, or terminate your access to all or any part of the MySpace Services at any time, for any or no reason, with or without prior notice, and without liability. MySpace expressly reserves the right to remove your profile and/or restrict, suspend, or terminate your access to any part of MySpace Services if MySpace determines, in its sole discretion, that you pose a threat to MySpace and/or its Users.

1. **Eligibility.** Use of and Membership in the MySpace Services is void where prohibited. By using the MySpace Services, you represent and warrant that (a) all registration information you submit is truthful and accurate; (b) you will maintain the accuracy of such information; (c) you are 14 years of age or older; and (d) your use of the MySpace Services does not violate any applicable law or regulation. Your profile may be deleted and your Membership may be terminated without warning, if we believe that you are under 14 years of age.
2. **Term.** This Agreement shall remain in full force and effect while you use the MySpace Services or are a Member. You may terminate your Membership at any time, for any reason, by following the instructions on the Member's Account Settings page. MySpace.com may terminate your Membership at any time, without warning. Even after Membership is terminated, this Agreement will remain in effect, including sections 5-17.
3. **Fees.** You acknowledge that MySpace.com reserves the right to charge for the MySpace Services and to change its fees from time to time in its discretion. If MySpace.com terminates your Membership because you have breached the Agreement, you shall not be entitled to the refund of any unused portion of subscription fees.
4. **Password.** When you sign up to become a Member, you will also be asked to choose a password. You are entirely responsible for maintaining the confidentiality of your password. You agree not to use the account, username, or password of another Member at any time or to disclose your password to any third party. You agree to notify MySpace.com

immediately if you suspect any unauthorized use of your account or access to your password. You are solely responsible for any and all use of your account.

5. **Non-commercial Use by Members.** The MySpace Services are for the personal use of Members only and may not be used in connection with any commercial endeavors except those that are specifically endorsed or approved by MySpace.com. Illegal and/or unauthorized use of the MySpace Services, including collecting usernames and/or email addresses of Members by electronic or other means for the purpose of sending unsolicited email or unauthorized framing of or linking to the MySpace Website is prohibited. Commercial advertisements, affiliate links, and other forms of solicitation may be removed from Member profiles without notice and may result in termination of Membership privileges. Appropriate legal action will be taken for any illegal or unauthorized use of the MySpace Services.

6. **Proprietary Rights in Content on MySpace.com.**

1. MySpace.com does not claim any ownership rights in the text, files, images, photos, video, sounds, musical works, works of authorship, or any other materials (collectively, "Content") that you post to the MySpace Services. After posting your Content to the MySpace Services, you continue to retain all ownership rights in such Content, and you continue to have the right to use your Content in any way you choose. By displaying or publishing ("posting") any Content on or through the MySpace Services, you hereby grant to MySpace.com a limited license to use, modify, publicly perform, publicly display, reproduce, and distribute such Content solely on and through the MySpace Services.

Without this license, MySpace.com would be unable to provide the MySpace Services. For example, without the right to modify Member Content, MySpace.com would not be able to digitally compress music files that Members submit or otherwise format Content to satisfy technical requirements, and without the right to publicly perform Member Content, MySpace.com could not allow Users to listen to music posted by Members. The license you grant to MySpace.com is non-exclusive (meaning you are free to license your Content to anyone else in addition to MySpace.com), fully-paid and royalty-free (meaning that MySpace.com is not required to pay you for the use on the MySpace Services of the Content that you post), sublicensable (so that MySpace.com is able to use its affiliates and subcontractors such as Internet content delivery networks to provide the MySpace Services), and worldwide (because the Internet and the MySpace Services are global in reach). This license will terminate at the time you remove your Content from the MySpace Services. The license does not grant MySpace.com the right to sell your Content, nor does the license grant MySpace.com the right to distribute your Content outside of

the MySpace Services.

2. You represent and warrant that: (i) you own the Content posted by you on or through the MySpace Services or otherwise have the right to grant the license set forth in this section, and (ii) the posting of your Content on or through the MySpace Services does not violate the privacy rights, publicity rights, copyrights, contract rights or any other rights of any person. You agree to pay for all royalties, fees, and any other monies owing any person by reason of any Content posted by you to or through the MySpace Services.
3. The MySpace Services contain Content of MySpace.com ("MySpace.com Content"). MySpace.com Content is protected by copyright, trademark, patent, trade secret and other laws, and MySpace.com owns and retains all rights in the MySpace.com Content and the MySpace Services. MySpace.com hereby grants you a limited, revocable, nonsublicensable license to reproduce and display the MySpace.com Content (excluding any software code) solely for your personal use in connection with viewing the MySpace Website and using the MySpace Services.
4. The MySpace Services contain Content of Users and other MySpace.com licensors. Except for Content posted by you, you may not copy, modify, translate, publish, broadcast, transmit, distribute, perform, display, or sell any Content appearing on or through the MySpace Services.

7. Content Posted.

1. MySpace.com may delete any Content that in the sole judgment of MySpace.com violates this Agreement or which may be offensive, illegal or violate the rights, harm, or threaten the safety of any person. MySpace.com assumes no responsibility for monitoring the MySpace Services for inappropriate Content or conduct. If at any time MySpace.com chooses, in its sole discretion, to monitor the MySpace Services, MySpace.com nonetheless assumes no responsibility for the Content, no obligation to modify or remove any inappropriate Content, and no responsibility for the conduct of the User submitting any such Content.
2. You are solely responsible for the Content that you post on or through any of the MySpace Services, and any material or information that you transmit to other Members and for your interactions with other Users. MySpace.com does not endorse and has no control over the Content. Content is not necessarily reviewed by MySpace.com prior to posting and does not necessarily reflect the opinions or policies of MySpace.com. MySpace.com makes no warranties, express or implied, as to the Content or to the accuracy and reliability of the Content or any material or information that you transmit to other Members.

8. Content/Activity Prohibited. The following is a partial list of the kind of Content that is illegal or prohibited to post on or through the MySpace

Services. MySpace.com reserves the right to investigate and take appropriate legal action against anyone who, in MySpace.com's sole discretion, violates this provision, including without limitation, removing the offending communication from the MySpace Services and terminating the Membership of such violators. Prohibited Content includes, but is not limited to Content that, in the sole discretion of MySpace.com:

1. is patently offensive and promotes racism, bigotry, hatred or physical harm of any kind against any group or individual;
2. harasses or advocates harassment of another person;
3. exploits people in a sexual or violent manner;
4. contains nudity, violence, or offensive subject matter or contains a link to an adult website;
5. solicits personal information from anyone under 18;
6. provides any telephone numbers, street addresses, last names, URLs or email addresses;
7. promotes information that you know is false or misleading or promotes illegal activities or conduct that is abusive, threatening, obscene, defamatory or libelous;
8. promotes an illegal or unauthorized copy of another person's copyrighted work, such as providing pirated computer programs or links to them, providing information to circumvent manufacture-installed copy-protect devices, or providing pirated music or links to pirated music files;
9. involves the transmission of "junk mail," "chain letters," or unsolicited mass mailing, instant messaging, "spimming," or "spamming";
10. contains restricted or password only access pages or hidden pages or images (those not linked to or from another accessible page);
11. furthers or promotes any criminal activity or enterprise or provides instructional information about illegal activities including, but not limited to making or buying illegal weapons, violating someone's privacy, or providing or creating computer viruses;
12. solicits passwords or personal identifying information for commercial or unlawful purposes from other Users;
13. involves commercial activities and/or sales without our prior written consent such as contests, sweepstakes, barter, advertising, or pyramid schemes;
14. includes a photograph of another person that you have posted without that person's consent; or
15. for band and filmmaker profiles, uses sexually suggestive imagery or any other unfair, misleading or deceptive Content intended to draw traffic to the profile.

The following is a partial list of the kind of activity that is illegal or prohibited on the MySpace Website and through your use of the MySpace Services. MySpace.com reserves the right to investigate and take appropriate legal action against anyone who, in MySpace.com's sole discretion, violates this provision, including without limitation, reporting you

to law enforcement authorities. Prohibited activity includes, but is not limited to:

1. criminal or tortious activity, including child pornography, fraud, trafficking in obscene material, drug dealing, gambling, harassment, stalking, spamming, spimming, sending of viruses or other harmful files, copyright infringement, patent infringement, or theft of trade secrets;
2. advertising to, or solicitation of, any Member to buy or sell any products or services through the MySpace Services. You may not transmit any chain letters or junk email to other Members. It is also a violation of these rules to use any information obtained from the MySpace Services in order to contact, advertise to, solicit, or sell to any Member without their prior explicit consent. In order to protect our Members from such advertising or solicitation, MySpace.com reserves the right to restrict the number of emails which a Member may send to other Members in any 24-hour period to a number which MySpace.com deems appropriate in its sole discretion. If you breach this Agreement and send unsolicited bulk email, instant messages or other unsolicited communications of any kind through the MySpace Services, you acknowledge that you will have caused substantial harm to MySpace.com, but that the amount of such harm would be extremely difficult to ascertain. As a reasonable estimation of such harm, you agree to pay MySpace.com \$50 for each such unsolicited email or other unsolicited communication you send through the MySpace Services;
3. covering or obscuring the banner advertisements on your personal profile page, or any MySpace.com page via HTML/CSS or any other means;
4. any automated use of the system, such as using scripts to add friends or send comments or messages;
5. interfering with, disrupting, or creating an undue burden on the MySpace Services or the networks or services connected to the MySpace Services;
6. attempting to impersonate another Member or person;
7. for band profiles, copying the code for your MySpace Player and embedding it into other profiles or asking other Members to embed it into their profiles;
8. using the account, username, or password of another Member at any time or disclosing your password to any third party or permitting any third party to access your account;
9. selling or otherwise transferring your profile;
10. using any information obtained from the MySpace Services in order to harass, abuse, or harm another person;
11. displaying an advertisement on your profile, or accepting payment or anything of value from a third person in exchange for your performing any commercial activity on or through the MySpace Services on behalf of that person, such as placing commercial content on your profile, posting blogs or bulletins with a commercial

- purpose, selecting a profile with a commercial purpose as one of your "Top 8" friends, or sending private messages with a commercial purpose; or
12. using the MySpace Services in a manner inconsistent with any and all applicable laws and regulations.
9. **Copyright Policy.** You may not post, modify, distribute, or reproduce in any way any copyrighted material, trademarks, or other proprietary information belonging to others without obtaining the prior written consent of the owner of such proprietary rights. It is the policy of MySpace.com to terminate Membership privileges of any Member who repeatedly infringes the copyright rights of others upon receipt of proper notification to MySpace.com by the copyright owner or the copyright owner's legal agent. Without limiting the foregoing, if you believe that your work has been copied and posted on the MySpace Services in a way that constitutes copyright infringement, please provide our Copyright Agent with the following information: (i) an electronic or physical signature of the person authorized to act on behalf of the owner of the copyright interest; (ii) a description of the copyrighted work that you claim has been infringed; (iii) a description of where the material that you claim is infringing is located on the MySpace Services; (iv) your address, telephone number, and email address; (v) a written statement by you that you have a good faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; (vi) a statement by you, made under penalty of perjury, that the above information in your notice is accurate and that you are the copyright owner or authorized to act on the copyright owner's behalf. MySpace.com's Copyright Agent for notice of claims of copyright infringement can be reached as follows: Copyright Agent, MySpace, Inc., 8391 Beverly Blvd., #349, Los Angeles, CA 90048; Facsimile: (310) 969-7394; Attn: Copyright Agent; and email: copyrightagent@myspace.com.
10. **Member Disputes.** You are solely responsible for your interactions with other MySpace.com Members. MySpace.com reserves the right, but has no obligation, to monitor disputes between you and other Members.
11. **Privacy.** Use of the MySpace Services is also governed by our Privacy Policy, which is incorporated into this Agreement by this reference.
12. **Disclaimers.** MySpace.com is not responsible for any incorrect or inaccurate Content posted on the MySpace Website or in connection with the MySpace Services, whether caused by Users of the MySpace Services or by any of the equipment or programming associated with or utilized in the MySpace Services. Profiles created and posted by Members on the MySpace Website may contain links to other websites. MySpace.com is not responsible for the Content, accuracy or opinions expressed on such websites, and such websites are in no way investigated, monitored or checked for accuracy or completeness by MySpace.com. Inclusion of any linked website on the MySpace Services does not imply approval or endorsement of the linked website by

MySpace.com. When you access these third-party sites, you do so at your own risk. MySpace.com takes no responsibility for third party advertisements which are posted on this MySpace Website or through the MySpace Services, nor does it take any responsibility for the goods or services provided by its advertisers. MySpace.com is not responsible for the conduct, whether online or offline, of any User of the MySpace Services. MySpace.com assumes no responsibility for any error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, or alteration of, any User or Member communication. MySpace.com is not responsible for any problems or technical malfunction of any telephone network or lines, computer online systems, servers or providers, computer equipment, software, failure of any email or players due to technical problems or traffic congestion on the Internet or on any of the MySpace Services or combination thereof, including any injury or damage to Users or to any person's computer related to or resulting from participation or downloading materials in connection with the MySpace Services. Under no circumstances shall MySpace.com be responsible for any loss or damage, including personal injury or death, resulting from use of the MySpace Services, attendance at a MySpace.com event, from any Content posted on or through the MySpace Services, or from the conduct of any Users of the MySpace Services, whether online or offline. The MySpace Services are provided "AS-IS" and as available and MySpace.com expressly disclaims any warranty of fitness for a particular purpose or non-infringement. MySpace.com cannot guarantee and does not promise any specific results from use of the MySpace Services.

13. **Limitation on Liability.** IN NO EVENT SHALL MYSPACE.COM BE LIABLE TO YOU OR ANY THIRD PARTY FOR ANY INDIRECT, CONSEQUENTIAL, EXEMPLARY, INCIDENTAL, SPECIAL OR PUNITIVE DAMAGES, INCLUDING LOST PROFIT DAMAGES ARISING FROM YOUR USE OF THE SERVICES, EVEN IF MYSPACE.COM HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, MYSPACE.COM'S LIABILITY TO YOU FOR ANY CAUSE WHATSOEVER AND REGARDLESS OF THE FORM OF THE ACTION, WILL AT ALL TIMES BE LIMITED TO THE AMOUNT PAID, IF ANY, BY YOU TO MYSPACE.COM FOR THE MYSPACE SERVICES DURING THE TERM OF MEMBERSHIP.
14. **U.S. Export Controls.** Software available in connection with the MySpace Services (the "Software") is further subject to United States export controls. No Software may be downloaded from the MySpace Services or otherwise exported or re-exported in violation of U.S. export laws. Downloading or using the Software is at your sole risk.
15. **Disputes.** If there is any dispute about or involving the MySpace Services, you agree that the dispute shall be governed by the laws of the State of

California, USA, without regard to conflict of law provisions and you agree to exclusive personal jurisdiction and venue in the state and federal courts of the United States located in the State of California, City of Los Angeles. Either MySpace.com or you may demand that any dispute between MySpace.com and you about or involving the MySpace Services must be settled by arbitration utilizing the dispute resolution procedures of the American Arbitration Association (AAA) in Los Angeles, California, USA, provided that the foregoing shall not prevent MySpace.com from seeking injunctive relief in a court of competent jurisdiction.

16. **Indemnity.** You agree to indemnify and hold MySpace.com, its subsidiaries, and affiliates, and their respective officers, agents, partners and employees, harmless from any loss, liability, claim, or demand, including reasonable attorneys' fees, made by any third party due to or arising out of your use of the MySpace Services in violation of this Agreement and/or arising from a breach of this Agreement and/or any breach of your representations and warranties set forth above and/or if any Content that you post on the MySpace Website or through the MySpace Services causes MySpace.com to be liable to another.
17. **Other.** This Agreement is accepted upon your use of the MySpace Website or any of the MySpace Services and is further affirmed by you becoming a Member. This Agreement constitutes the entire agreement between you and MySpace.com regarding the use of the MySpace Services. The failure of MySpace.com to exercise or enforce any right or provision of this Agreement shall not operate as a waiver of such right or provision. The section titles in this Agreement are for convenience only and have no legal or contractual effect. MySpace.com is a trademark of MySpace, Inc. This Agreement operates to the fullest extent permissible by law. If any provision of this Agreement is unlawful, void or unenforceable, that provision is deemed severable from this Agreement and does not affect the validity and enforceability of any remaining provisions.

Please contact us at: [Contact MySpace](#) with any questions regarding this Agreement.

I HAVE READ THIS AGREEMENT AND AGREE TO ALL OF THE PROVISIONS CONTAINED ABOVE.

14 APPENDIX C

Second Life - Terms of Service as at 23 July 2007

Welcome to Second Life! The following agreement (this "Agreement" or the "Terms of Service") describes the terms on which Linden Research, Inc. ("Linden Lab") offers you access to its services. This offer is conditioned on your agreement to all of the terms and conditions contained in the Terms of Service, including your compliance with the policies and terms linked to (by way of the provided URLs) from this Agreement. By using Second Life, you agree to these Terms of Service. If you do not so agree, you should decline this agreement, in which case you are prohibited from accessing or using Second Life. Linden Lab may amend this Agreement at any time in its sole discretion, effective upon posting the amended Agreement at the domain or subdomains of <http://secondlife.com> where the prior version of this Agreement was posted, or by communicating these changes through any written contact method we have established with you.

THE SERVICES AND CONTENT OF SECOND LIFE

1.1 Basic description of the service: Second Life, a multi-user environment, including software and websites.

"Second Life" is the multi-user online service offered by Linden Lab, including the software provided to you by Linden Lab (collectively, the "Linden Software") and the online environments that support the service, including without limitation: the server computation, software access, messaging and protocols that simulate the Second Life environment (the "Servers"), the software that is provided by Linden Lab and installed on the local computer or other device you use to access the Servers and thereby view or otherwise access the Second Life environment (the "Viewer"), application program interfaces provided by Linden Lab to you for use with Second Life (the "APIs"), and access to the websites and services available from the domain and subdomains of <http://secondlife.com> (the "Websites"). The Servers, Viewer, APIs, Websites and any other Linden Software collectively constitute the "Service" as used in this Agreement.

1.2 Linden Lab is a service provider, which means, among other things, that Linden Lab does not control various aspects of the Service.

You acknowledge that Linden Lab is a service provider that may allow people to interact online regarding topics and content chosen by users of the service, and that users can alter the service environment on a real-time basis. Linden

Lab generally does not regulate the content of communications between users or users' interactions with the Service. As a result, Linden Lab has very limited control, if any, over the quality, safety, morality, legality, truthfulness or accuracy of various aspects of the Service.

1.3 Content available in the Service may be provided by users of the Service, rather than by Linden Lab. Linden Lab and other parties have rights in their respective content, which you agree to respect.

You acknowledge that: (i) by using the Service you may have access to graphics, sound effects, music, video, audio, computer programs, animation, text and other creative output (collectively, "Content"), and (ii) Content may be provided under license by independent content providers, including contributions from other users of the Service (all such independent content providers, "Content Providers"). Linden Lab does not pre-screen Content.

You acknowledge that Linden Lab and other Content Providers have rights in their respective Content under copyright and other applicable laws and treaty provisions, and that except as described in this Agreement, such rights are not licensed or otherwise transferred by mere use of the Service. You accept full responsibility and liability for your use of any Content in violation of any such rights. You agree that your creation of Content is not in any way based upon any expectation of compensation from Linden Lab.

Certain of the fonts in the Meta family of copyrighted typefaces are used in Second Life under license from FSI FontShop International. You acknowledge that you may not copy any Meta font that is included in the Viewer and that you may use any such Meta font solely to the extent necessary to use the Linden Software in Second Life and that you will not use such Meta fonts for any other purpose whatsoever.

1.4 Second Life "currency" is a limited license right available for purchase or free distribution at Linden Lab's discretion, and is not redeemable for monetary value from Linden Lab.

You acknowledge that the Service presently includes a component of in-world fictional currency ("Currency" or "Linden Dollars" or "L\$"), which constitutes a limited license right to use a feature of our product when, as, and if allowed by Linden Lab. Linden Lab may charge fees for the right to use Linden Dollars, or may distribute Linden Dollars without charge, in its sole discretion. Regardless of terminology used, Linden Dollars represent a limited license right governed solely under the terms of this Agreement, and are not redeemable for any sum of money or monetary value from Linden Lab at any time. You agree that Linden Lab has the absolute right to manage, regulate, control, modify and/or eliminate such Currency as it sees fit in its sole discretion, in any general or specific case, and that Linden Lab will have no liability to you based on its exercise of such right.

1.5 Second Life offers an exchange, called LindeX, for the trading of Linden Dollars, which uses the terms "buy" and "sell" to indicate the

transfer of license rights to use Linden Dollars. Use and regulation of LindeX is at Linden Lab's sole discretion.

The Service currently includes a component called "Currency Exchange" or "LindeX," which refers to an aspect of the Service through which Linden Lab administers transactions among users for the purchase and sale of the licensed right to use Currency. Notwithstanding any other language or context to the contrary, as used in this Agreement and throughout the Service in the context of Currency transfer: (a) the term "sell" means "to transfer for consideration to another user the licensed right to use Currency in accordance with the Terms of Service," (b) the term "buy" means "to receive for consideration from another user the licensed right to use Currency in accordance with the Terms of Service," (c) the terms "buyer," "seller," "sale" and "purchase" and similar terms have corresponding meanings to the root terms "buy" and "sell," (d) "sell order" and similar terms mean a request from a user to Linden Lab to list Currency for sale on the Currency Exchange at a requested sale price, and (e) "buy order" and similar terms mean a request from a user for Linden Lab to match open sale listings with a requested purchase price and facilitate completion of the sale of Currency.

You agree and acknowledge that Linden Lab may deny any sell order or buy order individually or with respect to general volume or price limitations set by Linden Lab for any reason. Linden Lab may limit sellers or buyers to any group of users at any time. Linden Lab may halt, suspend, discontinue, or reverse any Currency Exchange transaction (whether proposed, pending or past) in cases of actual or suspected fraud, violations of other laws or regulations, or deliberate disruptions to or interference with the Service.

1.6 Second Life is subject to scheduled and unscheduled service interruptions. All aspects of the Service are subject to change or elimination at Linden Lab's sole discretion.

Linden Lab reserves the right to interrupt the Service with or without prior notice for any reason or no reason. You agree that Linden Lab will not be liable for any interruption of the Service, delay or failure to perform, and you understand that except as otherwise specifically provided in Linden Lab's billing policies posted at <http://secondlife.com/corporate/billing.php>, you shall not be entitled to any refunds of fees for interruption of service or failure to perform. Linden Lab has the right at any time for any reason or no reason to change and/or eliminate any aspect(s) of the Service as it sees fit in its sole discretion.

1.7 In the event you choose to use paid aspects of the Service, you agree to the posted pricing and billing policies on the Websites.

Certain aspects of the Service are provided for a fee or other charge. These fees and charges are described on the Websites, and in the event you elect to use paid aspects of the Service, you agree to the pricing, payment and billing policies applicable to such fees and charges, posted or linked at

<http://secondlife.com/corporate/billing.php>. Linden Lab may add new services for additional fees and charges, or proactively amend fees and charges for existing services, at any time in its sole discretion.

ACCOUNT REGISTRATION AND REQUIREMENTS

2.1 You must establish an account to use Second Life, using true and accurate registration information.

You must establish an account with Linden Lab (your "Account") to use the Service, except for those portions of the Websites to which Linden Lab allows access without registration. You agree to provide true, accurate, current and complete information about yourself as prompted by the registration form ("Registration Data") and maintain and promptly update the Registration Data to keep it true, accurate, current and complete. You may establish an Account with Registration Data provided to Linden Lab by a third party through the use of an API, in which case you may have a separate, additional account relationship with such third party. You authorize Linden Lab, directly or through third parties, to make any inquiries we consider necessary to validate your Registration Data. Linden Lab reserves all rights to vigorously pursue legal action against all persons who misrepresent personal information or are otherwise untruthful about their identity, and to suspend or cancel Accounts registered with inaccurate or incomplete information. Notwithstanding the foregoing, you acknowledge that Linden Lab cannot guarantee the accuracy of any information submitted by any user of the Service, nor any identity information about any user.

2.2 You must be 13 years of age or older to access Second Life; minors over the age of 13 are only permitted in a separate area, which adults are generally prohibited from using. Linden Lab cannot absolutely control whether minors or adults gain unauthorized access to the Service.

You must be at least 13 years of age to participate in the Service. Users under the age of 18 are prohibited from accessing the Service other than in the area designated by Linden Lab for use by users from 13 through 17 years of age (the "Teen Area"). Users age 18 and older are prohibited from accessing the Teen Area. Any user age 18 and older who gains unauthorized access to the Teen Area is in breach of this Agreement and may face immediate termination of any or all Accounts held by such user for any area of the Service. If you reside in a jurisdiction where the age of majority is greater than 18 years old, you are prohibited from accessing the Service until you have reached such age of majority.

By accepting this agreement in connection with an Account outside the Teen Area, you represent that you are an adult 18 years of age or older. By accepting this agreement in connection with an Account for use in the Teen Area, you represent that (i) you are at least 13 years of age and less than 18 years of age; (ii) you have read and accept this Agreement; (iii) your parent or legal guardian has consented to you having an Account for use of the Teen Area and participating in the Service, and to providing your personal

information for your Account; and (iv) your parent or legal guardian has read and accepted this Agreement.

Linden Lab cannot absolutely control whether minors gain access to the Service other than the Teen Area, and makes no representation that users outside the Teen Area are not minors. Linden Lab cannot absolutely control whether adults gain access to the Teen Area of the Service, and makes no representation that users inside the Teen Area are not adults. Adult employees, contractors and partners of Linden Lab regularly conduct their work in the Teen Area. Linden Lab cannot ensure that other users or any non-employee of Linden Lab will not provide Content or access to Content that parents or guardians may find inappropriate or that any user may find objectionable.

2.3 You need to use an account name in Second Life which is not misleading, offensive or infringing. You must select and keep secure your account password.

You must choose an account name to identify yourself to Linden Lab staff (your "Account Name"), which will also serve as the name for the graphical representation of your body in the Service (such representation, an "Avatar"). You may not select as your Account Name the name of another person to the extent that could cause deception or confusion; a name which violates any trademark right, copyright, or other proprietary right; a name which may mislead other users to believe you to be an employee of Linden Lab; or a name which Linden Lab deems in its discretion to be vulgar or otherwise offensive. Linden Lab reserves the right to delete or change any Account Name for any reason or no reason. You are fully responsible for all activities conducted through your Account or under your Account Name.

At the time your Account is opened, you must select a password. You are responsible for maintaining the confidentiality of your password and are responsible for any harm resulting from your disclosure, or authorizing the disclosure of, your password or from use by any person of your password to gain access to your Account or Account Name. At no time should you respond to an online request for a password other than in connection with the log-on process to the Service. Your disclosure of your password to any other person is entirely at your own risk.

2.4 Account registrations are limited per unique person. Transfers of accounts are generally not permitted.

Linden Lab may require you to submit an indication of unique identity in the account registration process; e.g. credit card or other payment information, or SMS message code or other information requested by Linden Lab. When an account is created, the information given for the account must match the address, phone number, and/or other unique identifier information associated with the identification method. You may register multiple accounts per identification method only at Linden Lab's sole discretion. A single account may be used by a single legal entity at Linden Lab's sole discretion and subject to Linden Lab's requirements. Additional accounts beyond the first

account per unique user may be subject to fees upon account creation. You may not transfer your Account to any third party without the prior written consent of Linden Lab; notwithstanding the foregoing, Linden Lab will not unreasonably withhold consent to the transfer of an Account in good standing by operation of valid written will to a single natural person, provided that proper notice and documentation are delivered as requested by Linden Lab.

2.5 You may cancel your account at any time; however, there are no refunds for cancellation.

Accounts may be cancelled by you at any time. Upon your election to cancel, your account will be cancelled within 24 hours, but if you have paid for a period in advance you will be allowed to use the remaining time according to these Terms of Service unless your account or this Agreement is suspended or terminated based on our belief that you have violated this Agreement. There will be no refunds for any unused time on a subscription or any prepaid fees for any portion of the Service.

2.6 Linden Lab may suspend or terminate your account at any time, without refund or obligation to you.

Linden Lab has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or terminates your Account or this Agreement, you understand and agree that you shall receive no refund or exchange for any unused time on a subscription, any license or subscription fees, any content or data associated with your Account, or for anything else.

2.7 Accounts affiliated with delinquent accounts are subject to remedial actions related to the delinquent account.

In the event an Account is suspended or terminated for your breach of this Agreement or your payment delinquency (in each case as determined in Linden Lab's sole discretion), Linden Lab may suspend or terminate the Account associated with such breach and any or all other Accounts held by you or your affiliates, and your breach shall be deemed to apply to all such Accounts.

2.8 You are responsible for your own Internet access.

Linden Lab does not provide Internet access, and you are responsible for all fees associated with your Internet connection.

LICENSE TERMS AND OTHER INTELLECTUAL PROPERTY TERMS

3.1 You have a nonexclusive, limited, revocable license to use Second Life while you are in compliance with the terms of service.

Subject to the terms of this Agreement, Linden Lab grants to you a non-exclusive, limited, fully revocable license to use the Linden Software and the rest of the Service during the time you are in full compliance with the Terms of Service. Additional terms may apply to use of the APIs or other separate elements of the Service (i.e. elements that are not required to use the Viewer or the Servers); these terms are available where such separate elements are available for download from the Websites. Nothing in this Agreement, or on Linden Lab's websites, shall be construed as granting you any other rights or privileges of any kind with respect to the Service or to any Content. You acknowledge that your participation in the Service, including your creation or uploading of Content in the Service, does not make you a Linden Lab employee and that you do not expect to be, and will not be, compensated by Linden Lab for such activities.

3.2 You retain copyright and other intellectual property rights with respect to Content you create in Second Life, to the extent that you have such rights under applicable law. However, you must make certain representations and warranties, and provide certain license rights, forbearances and indemnification, to Linden Lab and to other users of Second Life.

Users of the Service can create Content on Linden Lab's servers in various forms. Linden Lab acknowledges and agrees that, subject to the terms and conditions of this Agreement, you will retain any and all applicable copyright and other intellectual property rights with respect to any Content you create using the Service, to the extent you have such rights under applicable law. Notwithstanding the foregoing, you understand and agree that by submitting your Content to any area of the service, you automatically grant (and you represent and warrant that you have the right to grant) to Linden Lab: (a) a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive right and license to (i) use, reproduce and distribute your Content within the Service as permitted by you through your interactions on the Service, and (ii) use and reproduce (and to authorize third parties to use and reproduce) any of your Content in any or all media for marketing and/or promotional purposes in connection with the Service, provided that in the event that your Content appears publicly in material under the control of Linden Lab, and you provide written notice to Linden Lab of your desire to discontinue the distribution of such Content in such material (with sufficient specificity to allow Linden Lab, in its sole discretion, to identify the relevant Content and materials), Linden Lab will make commercially reasonable efforts to cease its distribution of such Content following the receipt of such notice, although Linden Lab cannot provide any assurances regarding materials produced or distributed prior to the receipt of such notice; (b) the perpetual and irrevocable right to delete any or all of your Content from Linden Lab's servers and from the Service, whether intentionally or unintentionally, and for any reason or no reason, without any liability of any kind to you or any other party; and (c) a royalty-free, fully paid-up, perpetual, irrevocable, non-exclusive right and license to copy, analyze and use any of your Content as Linden Lab may deem necessary or desirable for purposes of debugging, testing and/or providing

support services in connection with the Service. Further, you agree to grant to Linden Lab a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive, sublicensable right and license to exercise the copyright, publicity, and database rights you have in your account information, including any data or other information generated by your account activity, in any media now known or not currently known, in accordance with our privacy policy as set forth below, including the incorporation by reference of terms posted at <http://secondlife.com/corporate/privacy.php>.

You also understand and agree that by submitting your Content to any area of the Service, you automatically grant (or you warrant that the owner of such Content has expressly granted) to Linden Lab and to all other users of the Service a non-exclusive, worldwide, fully paid-up, transferable, irrevocable, royalty-free and perpetual License, under any and all patent rights you may have or obtain with respect to your Content, to use your Content for all purposes within the Service. You further agree that you will not make any claims against Linden Lab or against other users of the Service based on any allegations that any activities by either of the foregoing within the Service infringe your (or anyone else's) patent rights.

You further understand and agree that: (i) you are solely responsible for understanding all copyright, patent, trademark, trade secret and other intellectual property or other laws that may apply to your Content hereunder; (ii) you are solely responsible for, and Linden Lab will have no liability in connection with, the legal consequences of any actions or failures to act on your part while using the Service, including without limitation any legal consequences relating to your intellectual property rights; and (iii) Linden Lab's acknowledgement hereunder of your intellectual property rights in your Content does not constitute a legal opinion or legal advice, but is intended solely as an expression of Linden Lab's intention not to require users of the Service to forego certain intellectual property rights with respect to Content they create using the Service, subject to the terms of this Agreement.

3.3 Linden Lab retains ownership of the account and related data, regardless of intellectual property rights you may have in content you create or otherwise own.

You agree that even though you may retain certain copyright or other intellectual property rights with respect to Content you create while using the Service, you do not own the account you use to access the Service, nor do you own any data Linden Lab stores on Linden Lab servers (including without limitation any data representing or embodying any or all of your Content). Your intellectual property rights do not confer any rights of access to the Service or any rights to data stored by or on behalf of Linden Lab.

3.4 Linden Lab licenses its textures and environmental content to you for your use in creating content in-world.

During any period in which your Account is active and in good standing, Linden Lab gives you permission to create still and/or moving media, for use only within the virtual world environment of the Service ("in-world"), which use

or include the "textures" and/or "environmental content" that are both (a) created or owned by Linden Lab and (b) displayed by Linden Lab in-world.

CONDUCT BY USERS OF SECOND LIFE

4.1 You agree to abide by certain rules of conduct, including the Community Standards and other rules prohibiting illegal and other practices that Linden Lab deems harmful.

You agree to read and comply with the Community Standards posted on the Websites, (for users 18 years of age and older, at <http://secondlife.com/corporate/cs.php>; and for users of the Teen Area, at <http://teen.secondlife.com/footer/cs>

In addition to abiding at all times by the Community Standards, you agree that you shall not: (i) take any action or upload, post, e-mail or otherwise transmit Content that infringes or violates any third party rights; (ii) impersonate any person or entity without their consent, including, but not limited to, a Linden Lab employee, or falsely state or otherwise misrepresent your affiliation with a person or entity; (iii) take any action or upload, post, e-mail or otherwise transmit Content that violates any law or regulation; (iv) take any action or upload, post, e-mail or otherwise transmit Content as determined by Linden Lab at its sole discretion that is harmful, threatening, abusive, harassing, causes tort, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable; (v) take any actions or upload, post, e-mail or otherwise transmit Content that contains any viruses, Trojan horses, worms, spyware, time bombs, cancelbots or other computer programming routines that are intended to damage, detrimentally interfere with, surreptitiously intercept or expropriate any system, data or personal information; (vi) take any action or upload, post, email or otherwise transmit any Content that would violate any right or duty under any law or under contractual or fiduciary relationships (such as inside information, proprietary and confidential information learned or disclosed as part of employment relationships or under nondisclosure agreements); (vii) upload, post, email or otherwise transmit any unsolicited or unauthorized advertising, or promotional materials, that are in the nature of "junk mail," "spam," "chain letters," "pyramid schemes," or any other form of solicitation that Linden Lab considers in its sole discretion to be of such nature; (viii) interfere with or disrupt the Service or servers or networks connected to the Service, or disobey any requirements, procedures, policies or regulations of networks connected to the Service; (ix) attempt to gain access to any other user's Account or password; or (x) "stalk", abuse or attempt to abuse, or otherwise harass another user. Any violation by you of the terms of the foregoing sentence may result in immediate and permanent suspension or cancellation of your Account. You agree that Linden Lab may take whatever steps it deems necessary to abridge, or prevent behavior of any sort on the Service in its sole discretion, without notice to you.

4.2 You agree to use Second Life as provided, without unauthorized software or other means of access or use. You will not make

unauthorized works from or conduct unauthorized distribution of the Linden Software.

Linden Lab has designed the Service to be experienced only as offered by Linden Lab at the Websites or partner websites. Linden Lab is not responsible for any aspect of the Service that is accessed or experienced using software or other means that are not provided by Linden Lab. You agree not to create or provide any server emulators or other software or other means that provide access to or use of the Servers without the express written authorization of Linden Lab. Notwithstanding the foregoing, you may use and create software that provides access to the Servers for substantially similar function (or subset thereof) as the Viewer; provided that such software is not used for and does not enable any violation of these Terms of Service. Linden Lab is not obligated to allow access to the Servers by any software that is not provided by Linden Lab, and you agree to cease using, creating, distributing or providing any such software at the request of Linden Lab. You are prohibited from taking any action that imposes an unreasonable or disproportionately large load on Linden Lab's infrastructure.

You may not charge any third party for using the Linden Software to access and/or use the Service, and you may not modify, adapt, reverse engineer (except as otherwise permitted by applicable law), decompile or attempt to discover the source code of the Linden Software, or create any derivative works of the Linden Software or the Service, or otherwise use the Linden Software except as expressly provided in this Agreement. You may not copy or distribute any of the written materials associated with the Service.

Notwithstanding the foregoing, you may copy the Viewer that Linden Lab provides to you, for backup purposes and may give copies of the Viewer to others free of charge. Further, you may use and modify the source code for the Viewer as permitted by any open source license agreement under which Linden Lab distributes such Viewer source code.

4.3 You will comply with the processes of the Digital Millennium Copyright Act regarding copyright infringement claims covered under such Act.

Our policy is to respond to notices of alleged infringement that comply with the Digital Millennium Copyright Act ("DMCA"). Copyright-infringing materials found within the world of Second Life can be identified and removed via Linden Lab's DMCA compliance process listed at <http://secondlife.com/corporate/dmca.php>, and you agree to comply with such process in the event you are involved in any claim of copyright infringement to which the DMCA may be applicable.

4.4 You will not use the marks of Linden Lab without authorization from Linden Lab.

You are not permitted to use the marks "Second Life", "Linden Lab", the eye-in-hand logo, or any other trade, service or other marks registered to or owned by Linden Lab, except as explicitly authorized by Linden Lab and in

accordance with guidelines posted at
http://secondlife.com/community/fansites_regs.php.

RELEASES, DISCLAIMERS OF WARRANTY, LIMITATION OF LIABILITY, AND INDEMNIFICATION

5.1 You release Linden Lab from your claims relating to other users of Second Life. Linden Lab has the right but not the obligation to resolve disputes between users of Second Life.

As a condition of access to the Service, you release Linden Lab (and Linden Lab's shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, distributors) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with any dispute you have or claim to have with one or more users of the Service. You further understand and agree that: (a) Linden Lab will have the right but not the obligation to resolve disputes between users relating to the Service, and Linden Lab's resolution of any particular dispute does not create an obligation to resolve any other dispute; (b) to the extent Linden Lab elects to resolve such disputes, it will do so in good faith based solely on the general rules and standards of the Service and will not make judgments regarding legal issues or claims; (c) Linden Lab's resolution of such disputes will be final with respect to the virtual world of the Service but will have no bearing on any real-world legal disputes in which users of the Service may become involved; and (d) you hereby release Linden Lab (and Linden Lab's shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, distributors) from claims, demands and damages (actual and consequential) of every kind and nature, known and unknown, suspected and unsuspected, disclosed and undisclosed, arising out of or in any way connected with Linden Lab's resolution of disputes relating to the Service.

5.2 Other service or product providers may form contractual relationships with you. Linden Lab is not a party to your relationship with such other providers.

Subject to the terms of this Agreement, you may view or use the environment simulated by the Servers through viewer software that is not the Viewer provided by Linden Lab, and you may register for use of Second Life through websites that are not Websites owned and operated by Second Life. Linden Lab is not responsible for any software used with or in connection with Second Life other than Linden Software developed by Linden Lab. Linden Lab does not control and is not responsible for any information you provide to parties other than Linden Lab. Linden Lab is not a party to your agreement with any party that provides software, products or services to you in connection with Second Life.

5.3 All data on Linden Lab's servers are subject to deletion, alteration or transfer.

When using the Service, you may accumulate Content, Currency, objects, items, scripts, equipment, or other value or status indicators that reside as data on Linden Lab's servers. THESE DATA, AND ANY OTHER DATA, ACCOUNT HISTORY AND ACCOUNT NAMES RESIDING ON LINDEN LAB'S SERVERS, MAY BE DELETED, ALTERED, MOVED OR TRANSFERRED AT ANY TIME FOR ANY REASON IN LINDEN LAB'S SOLE DISCRETION.

YOU ACKNOWLEDGE THAT, NOTWITHSTANDING ANY COPYRIGHT OR OTHER RIGHTS YOU MAY HAVE WITH RESPECT TO ITEMS YOU CREATE USING THE SERVICE, AND NOTWITHSTANDING ANY VALUE ATTRIBUTED TO SUCH CONTENT OR OTHER DATA BY YOU OR ANY THIRD PARTY, LINDEN LAB DOES NOT PROVIDE OR GUARANTEE, AND EXPRESSLY DISCLAIMS (SUBJECT TO ANY UNDERLYING INTELLECTUAL PROPERTY RIGHTS IN THE CONTENT), ANY VALUE, CASH OR OTHERWISE, ATTRIBUTED TO ANY DATA RESIDING ON LINDEN LAB'S SERVERS.

YOU UNDERSTAND AND AGREE THAT LINDEN LAB HAS THE RIGHT, BUT NOT THE OBLIGATION, TO REMOVE ANY CONTENT (INCLUDING YOUR CONTENT) IN WHOLE OR IN PART AT ANY TIME FOR ANY REASON OR NO REASON, WITH OR WITHOUT NOTICE AND WITH NO LIABILITY OF ANY KIND.

5.4 Linden Lab provides the Service on an "as is" basis, without express or implied warranties.

LINDEN LAB PROVIDES THE SERVICE, THE LINDEN SOFTWARE, YOUR ACCOUNT AND ALL OTHER SERVICES STRICTLY ON AN "AS IS" BASIS, PROVIDED AT YOUR OWN RISK, AND HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES OR CONDITIONS OF ANY KIND, WRITTEN OR ORAL, EXPRESS, IMPLIED OR STATUTORY, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF TITLE, NONINFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

Without limiting the foregoing, Linden Lab does not ensure continuous, error-free, secure or virus-free operation of the Service, the Linden Software or your Account, and you understand that you shall not be entitled to refunds for fees based on Linden Lab's failure to provide any of the foregoing other than as explicitly provided in this Agreement. Some jurisdictions do not allow the disclaimer of implied warranties, and to that extent, the foregoing disclaimer may not apply to you.

5.5 Linden Lab's liability to you is expressly limited, to the extent allowable under applicable law.

IN NO EVENT SHALL LINDEN LAB OR ANY OF ITS SHAREHOLDERS, PARTNERS, AFFILIATES, DIRECTORS, OFFICERS, SUBSIDIARIES, EMPLOYEES, AGENTS, SUPPLIERS, LICENSEES OR DISTRIBUTORS BE

LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, PUNITIVE OR EXEMPLARY DAMAGES, INCLUDING WITHOUT LIMITATION ANY DAMAGES FOR LOST PROFITS, ARISING (WHETHER IN CONTRACT, TORT, STRICT LIABILITY OR OTHERWISE) OUT OF OR IN CONNECTION WITH THE SERVICE (INCLUDING ITS MODIFICATION OR TERMINATION), THE LINDEN SOFTWARE, YOUR ACCOUNT (INCLUDING ITS TERMINATION OR SUSPENSION) OR THIS AGREEMENT, WHETHER OR NOT LINDEN LAB MAY HAVE BEEN ADVISED THAT ANY SUCH DAMAGES MIGHT OR COULD OCCUR AND NOTWITHSTANDING THE FAILURE OF ESSENTIAL PURPOSE OF ANY REMEDY. IN ADDITION, IN NO EVENT WILL LINDEN LAB'S CUMULATIVE LIABILITY TO YOU FOR DIRECT DAMAGES OF ANY KIND OR NATURE EXCEED FIFTY DOLLARS (U.S. \$50.00). Some jurisdictions do not allow the foregoing limitations of liability, so to the extent that any such limitation is impermissible, such limitation may not apply to you. You agree that Linden Lab cannot be held responsible or liable for anything that occurs or results from accessing or subscribing to the Service.

5.6 You will indemnify Linden lab from claims arising from breach of this Agreement by you, from your use of Second Life, from loss of Content due to your actions, or from alleged infringement by you.

At Linden Lab's request, you agree to defend, indemnify and hold harmless Linden Lab, its shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, distributors, Content Providers, and other users of the Service, from all damages, liabilities, claims and expenses, including without limitation attorneys' fees and costs, arising from any breach of this Agreement by you, or from your use of the Service. You agree to defend, indemnify and hold harmless Linden Lab, its shareholders, partners, affiliates, directors, officers, subsidiaries, employees, agents, suppliers, licensees, and distributors, from all damages, liabilities, claims and expenses, including without limitation attorneys' fees and costs, arising from: (a) any action or inaction by you in connection with the deletion, alteration, transfer or other loss of Content, status or other data held in connection with your Account, and (b) any claims by third parties that your activity or Content in the Service infringes upon, violates or misappropriates any of their intellectual property or proprietary rights.

PRIVACY POLICY

6.1 Linden Lab uses your personal information to operate and improve Second Life, and will not give your personal information to third parties except to operate, improve and protect the Service.

The personal information you provide to us during registration is used for Linden Lab's internal purposes only. Linden Lab uses the information it collects to learn what you like and to improve the Service. Linden Lab will not give any of your personal information to any third party without your express approval except: as reasonably necessary to fulfill your service request, to

third- party fulfillment houses, customer support, billing and credit verification services, and the like; to comply with tax and other applicable law; as otherwise expressly permitted by this Agreement or as otherwise authorized by you; to law enforcement or other appropriate third parties in connection with criminal investigations and other investigations of fraud; or as otherwise necessary to protect Linden Lab, its agents and other users of the Service. Linden Lab does not guarantee the security of any of your private transmissions against unauthorized or unlawful interception or access by third parties. Linden Lab can (and you authorize Linden Lab to) disclose any information about you to private entities, law enforcement agencies or government officials, as Linden Lab, in its sole discretion, believes necessary or appropriate to investigate or resolve possible problems or inquiries, or as otherwise required by law. If you request any technical support, you consent to Linden Lab's remote accessing and review of the computer onto which you load Linden Software for purposes of support and debugging. You agree that Linden Lab may communicate with you via email and any similar technology for any purpose relating to the Service, the Linden Software and any services or software which may in the future be provided by Linden Lab or on Linden Lab's behalf. You agree to read the disclosures and be bound by the terms of the additional Privacy Policy information posted on our website at <http://secondlife.com/corporate/privacy.php>.

6.2 Linden Lab may observe and record your interaction within the Service, and may share aggregated and other general information (not including your personal information) with third parties.

You acknowledge and agree that Linden Lab, in its sole discretion, may track, record, observe or follow any and all of your interactions within the Service. Linden Lab may share general, demographic, or aggregated information with third parties about our user base and Service usage, but that information will not include or be linked to any personal information without your consent.

GENERAL PROVISIONS

The rights and obligations of the parties under this Agreement shall not be governed by the U.N. Convention on Contracts for the International Sale of Goods; rather such rights and obligations shall be governed by and construed under the laws of the State of California, including its Uniform Commercial Code, without reference to conflict of laws principles. The Service is controlled and operated by Linden Lab from its offices within the State of California, United States of America. Linden Lab makes no representation that any aspect of the Service is appropriate or available for use in jurisdictions outside of the United States. Those who choose to access the Service from other locations are responsible for compliance with applicable local laws. The Linden Software is subject to all applicable export restrictions. You must comply with all export and import laws and restrictions and regulations of any United States or foreign agency or authority relating to the Linden Software and its use.

Any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination thereof, shall be finally settled by binding arbitration in San Francisco, California under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, either party may apply to any court of competent jurisdiction for injunctive relief or enforcement of this arbitration provision without breach of this arbitration provision.

Linden Lab's failure to act with respect to a breach by you or others does not waive Linden Lab's right to act with respect to that breach or subsequent or similar breaches. No consent or waiver by Linden Lab under this Agreement shall be deemed effective unless delivered in a writing signed by a duly appointed officer of Linden Lab. All or any of Linden Lab's rights and obligations under this Agreement may be assigned to a subsequent owner or operator of the Service in a merger, acquisition or sale of all or substantially all of Linden Lab's assets. You may not assign or transfer this Agreement or any or all of your rights hereunder without the prior written consent of Linden Lab, and any attempt to do so is void. Notwithstanding anything else in this Agreement, no default, delay or failure to perform on the part of Linden Lab shall be considered a breach of this Agreement if such default, delay or failure to perform is shown to be due to causes beyond the reasonable control of Linden Lab.

This Agreement sets forth the entire understanding and agreement between you and Linden Lab with respect to the subject matter hereof. The section headings used herein, including descriptive summary sentences at the start of each section, are for convenience only and shall not affect the interpretation of this Agreement. If any provision of this Agreement shall be held by a court of competent jurisdiction to be unlawful, void, or for any reason unenforceable, then in such jurisdiction that provision shall be deemed severable from these terms and shall not affect the validity and enforceability of the remaining provisions.

Linden Lab may give notice to you by means of a general notice on our website at <http://secondlife.com>, electronic mail to your e-mail address on our records for your Account, or by written communication sent by first class mail, postage prepaid, or overnight courier to your address on record for your Account. All notices given by you or required under this Agreement shall be faxed to: (415) 243-9045 Attn.: Customer Service/TOS; mailed to us at Linden Lab, 1100 Sansome Street, San Francisco, CA 94111, Attn: Customer Service/TOS.

Legal Aspects of Web 2.0 Activities:

Management of Legal Risk Associated with Use of YouTube, MySpace and Second Life

As Web 2.0 technologies proliferate, an increasing number of Australians, especially young Australians, are relying primarily on information and communication technologies to engage and interact with each other and the world. If governments are to have meaningful interaction with young people, it is therefore important for them to explore the potential of these communication platforms. But legal considerations must be taken into account when strategising how best to make use of emerging technologies.

This report identifies the practical legal risks associated with activities conducted in online participatory spaces. Encompassing Copyright, Privacy, Defamation, Breach of Confidence and other areas of law, the report outlines the main considerations that arise when engaging in the online environment. It also examines the popular social networking platforms YouTube, MySpace and Second Life in detail, analysing legal issues specific to their Terms of Use and functionality.